Jurisdictional Statement

81-1489

Office - Supreme Court, U.S.
FILED
FEB 9 1982
ALEXANDER L. STEVAS,
CLERK

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

XEROX CORPORATION,

Appellant,

—v.—

COUNTY OF HARRIS, TEXAS, and
CITY OF HOUSTON, TEXAS,

Appellees.

ON APPEAL FROM THE TEXAS COURT OF CIVIL APPEALS

JURISDICTIONAL STATEMENT

ALFRED H. HODDINOTT, JR.
800 Long Ridge Road
Stamford, Connecticut 06904
(203) 329-8700

Counsel for Appellant

February 9, 1982

QUESTION PRESENTED

Appellant Xerox Corporation ("Xerox"),* through subsidiaries, assembled copying machines abroad, shipped them to a customs bonded warehouse in Texas, stored them temporarily and then reshipped them abroad, at all times under customs bond.

May a state assess an ad valorem tax on goods that

a) were continuously in the flow of foreign commerce;

b) never entered domestic commerce or became part of the common mass of property within the state;

c) paused only temporarily within the state; and

d) were continuously under the supervision, custody and control of the United States Customs Service.

---

* The parties to this proceeding are as listed in the caption, except that pursuant to Supreme Court Rule 28.4(c), a copy of the notices of appeal and this statement were served upon the Attorney General of the State of Texas, since 28 U.S.C. § 2403(b) may be applicable. Pursuant to Supreme Court Rule 28.1, Xerox, a New York corporation, states that it has no parent or affiliates. Xerox has one United States subsidiary which is not wholly owned—Rank Xerox Business Equipment, Inc., a Delaware corporation. Xerox also has other subsidiaries, as defined by the Securities and Exchange Commission, in a number of foreign countries: Xerox do Brasil, S.A.; Xerox de Mexico, S.A. de C.V.; Xerox del Peru, S.A.; Xerox de Venezuela, C.A.; Xerox de Colombia, S.A.; Rank Xerox Limited; Rank Xerox Holding B.V.; Rank Xerox Manufacturing (Nederland) B.V.; Rank Xerox Fabrikations G.m.b.H.; Societe Industrielle Rank Xerox S.A.; Fuji Xerox Co., Ltd.; Office de Transformation Papetiere S.A.; Rank Xerox Espanola S.A.; Rank Xerox (N.Z.) Ltd.; and Rank Xerox (Australia) Pty. Ltd.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES	3
STATEMENT OF THE CASE	5
THE QUESTION PRESENTED REQUIRES PLENARY CONSIDERATION	9
DISCUSSION	10
1. The McGoldrick Case	10
2. The Michelin Case	13
3. In Transit	15
4. National Significance	18
CONCLUSION	19

TABLE OF AUTHORITIES

Cases	PAGE
American Smelting and Refining Co. v. County of Contra Costa, 271 Cal. App. 2d 437, 77 Cal. Rptr. 570, *appeal dismissed*, 396 U.S. 273 (1969)	13, 17
Bacon v. Illinois, 227 U.S. 504 (1913)	16
Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827)	14
Calvert v. Zanes-Ewalt Warehouse, Inc., 502 S.W.2d 689 (Tex. 1973)	16
Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies, 435 U.S. 734 (1978)	9, 15, 17
Hooven & Allison Co. v. Evatt, 324 U.S. 652 (1945)	14
Independent Warehouses, Inc. v. Scheele, 331 U.S. 70 (1947)	16
Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979)	2, 17
Kosydar v. National Cash Register Co., 417 U.S. 62 (1974)	16, 18
Low v. Austin, 80 U.S. (13 Wall.) 29 (1872)	14
McGoldrick v. Gulf Oil Corp., 309 U.S. 414 (1940)	9, 10-13
Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976)	9, 13-15, 16
National Distillers Products Corp. v. City and County of San Francisco, 141 Cal. App. 2d 651, 297 P.2d 61, *cert. denied*, 352 U.S. 928 (1956)	12
Susquehanna Coal Co. v. City of South Amboy, 228 U.S. 665 (1913)	16
Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534 (1959)	14

PAGE

Constitutions

UNITED STATES

Article I, Section 8, Clause 3 ..... 3, 8, 10
Article I, Section 10, Clause 2 ..... 3, 8, 13

TEXAS

Article VIII, Section 1 4

Statutes and Rules

UNITED STATES CODE

19 U.S.C. § 1555 ..... 3, 10
19 U.S.C. § 1556 ..... 3, 11, 12
19 U.S.C. § 1557(a) 3, 9, 11, 12, 17
28 U.S.C. § 1257(2) 2
28 U.S.C. § 2403(b) i

VERNON'S TEXAS CIVIL STATUTES

Article 7145 4

CODE OF FEDERAL REGULATIONS

19 C.F.R. §§ 19.1-19.6 11
19 C.F.R. § 19.2(c) 16
19 C.F.R. § 19.6 n.11 11

Other Materials

Securities and Exchange Commission, 1977 Form 10K Annual Report, Xerox Corporation, Notes to Consolidated Financial Statements, pp. 6, 19 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. ____

XEROX CORPORATION,

Appellant,

—v.—

COUNTY OF HARRIS, TEXAS, and
CITY OF HOUSTON, TEXAS,

Appellees.

ON APPEAL FROM THE TEXAS COURT OF CIVIL APPEALS

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The Supreme Court of Texas did not issue an opinion; its refusal of an Application for a Writ of Error appears in the appendix ("App.") hereto, p. 20a *infra*.

The opinion of the Texas Court of Civil Appeals, dated April 30, 1981, is reported at 619 S.W.2d 402. It is reprinted in the appendix, p. 1a *infra*.

The opinion and the amended findings of fact and conclusions of law of the trial court, the District Court for the 165th District, Houston, Texas, dated July 14 and October 24, 1980, are not reported. They are reprinted in the appendix, pp. 11a-19a *infra*.

JURISDICTION

This is an appeal drawing in question the validity of state statutes which were challenged as being repugnant to the Constitution and were held to be valid. It is an appeal from the decision of the Texas Court of Civil Appeals that the ad valorem taxes of appellees as applied to Xerox are valid and not prohibited by the Constitution of the United States. An Application for a Writ of Error to the Supreme Court of Texas was refused, on a finding of "no reversible error"; its judgment was entered on October 14, 1981. It overruled a motion for rehearing on November 25, 1981. See App. p. 21a *infra*. Notices of appeal to this Court were filed on January 29 and February 1, 1982 in the Supreme Court of Texas and the Texas Court of Civil Appeals respectively, App. pp. 22a-27a *infra*. This appeal is being docketed within 90 days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

The Court has clearly established its jurisdiction over the issues raised here. In *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 440-41 (1979), it held

> In this case, appellants drew in question the validity of California's ad valorem property tax, contending that the tax, as applied to their containers, was repugnant to the Commerce Clause and various treaties, and the California Supreme Court sustained the validity of the tax. Under these circumstances, this Court's appellate jurisdiction would seem manifest.
>
> * * * Appellants squarely challenged the constitutionality of the tax statute, as applied, and the California Supreme Court just as squarely sustained its validity, as applied. We have held consistently that a state statute is sustained within the meaning of § 1257(2) when a state court holds it applicable to a particular set of facts as against the contention that such application is invalid on federal grounds. [citations] We conclude that we have appellate jurisdiction of this case.

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Article I, Section 8, Clause 3

> The Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

United States Constitution, Article I, Section 10, Clause 2

> No state shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws. . . .

Title 19, United States Code

> § 1555. Buildings or parts of buildings and other inclosures may be designated by the Secretary of the Treasury as bonded warehouses for the storage of imported merchandise entered for warehousing. . . . Except as otherwise provided in this chapter, bonded warehouses shall be used solely for the storage of imported merchandise and shall be placed in charge of a proper officer of the customs, who, together with the proprietor thereof, shall have joint custody of all merchandise stored in the warehouse. . . .
>
> § 1556. The Secretary of the Treasury shall from time to time establish such rules and regulations as may be necessary for the establishment of bonded warehouses and to protect the interests of the Government in the conduct, management, and operation of such warehouses and in the withdrawal of and accounting for merchandise deposited therein.
>
> § 1557.[1] (a) Any merchandise subject to duty . . . may be entered for warehousing and be deposited in a bonded

---

1 As effective prior to October 3, 1978, the relevant time period.

warehouse at the expense and risk of the owner, importer, or consignee. Such merchandise may be withdrawn, at any time within 3 years from the date of importation, for consumption upon payment of the duties and charges accruing thereon at the rate of duty imposed by law upon such merchandise at the date of withdrawal; or may be withdrawn for exportation or for transportation and exportation to a foreign country, or for shipment or for transportation and shipment to the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or the island of Guam, without the payment of duties thereon, or for transportation and rewarehousing at another port or elsewhere, or for transfer to another bonded warehouse at the same port. . . .

Texas Constitution, Article VIII, Section 1

Taxation shall be equal and uniform. All real property and tangible personal property in this State, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law. . . .

Vernon's Texas Civil Statutes, Article 7145

All property, real, personal or mixed, except such as may be hereinafter expressly exempted, is subject to taxation, and the same shall be rendered and listed as herein prescribed.

STATEMENT OF THE CASE

The facts surrounding this case are simple and, as noted by the court below, basically undisputed. This statement is based essentially on the facts as set forth in the amended findings of fact and the lower court opinion. See App. pp. 15a-19a; 1a-10a *infra*.

Xerox manufactures copying machines domestically and, through subsidiary corporations, also assembles them abroad. For reasons of good will and to more effectively compete in the sale of copiers in Latin America, Xerox set up an assembly plant in Mexico City, Mexico. The governments of Mexico, Brazil and other members of the Latin America Free Trade Association ("LAFTA") give import and tariff concessions to companies that have a plant facility in a member country and, indeed, some countries deny import rights to manufacturers of copiers who do not have such a plant. Xerox had previously used the Panama Free Trade Zone to store copiers pending shipment to Latin America, but abandoned it due to anti-American feeling over the Panama Canal. Houston was chosen as the alternative location due, in part, to its excellent transportation facilities.

Most of the component parts of the copiers assembled at the Xerox plant in Mexico City were manufactured in the United States and shipped to Mexico for assembling. The parts were shipped from Rochester, New York, to Nuevo Laredo, Mexico, placed in Mexican customs bond and shipped to Xerox' plant. After being assembled for use in Latin America, the copiers were packaged individually and trucked to Nuevo Laredo, where they cleared Mexican customs. The copiers entered the United States at Laredo, Texas, and were placed in the custody and control of the United States Customs Service ("U.S. Customs"). They were shipped via a customs bonded trucking company to the Houston Terminal Warehouse in Houston, Harris County, Texas, a Class 3 customs bonded warehouse. The copiers were placed in the warehouse, under U.S. Customs

control and supervision, pending orders from affiliated Xerox corporations in Latin America. In the warehouse they were kept segregated from domestic goods. When an order was received, the goods were removed and transported by customs bonded trucks to either the Port of Houston or the Port of Miami, continuously under U.S. Customs control and supervision, where they were exported after first having cleared United States customs.

The goods in question were in the warehouse for varying periods of time, ranging from several days to twenty-five months. All were in the warehouse for less than the period provided for by the customs statute then in force. No United States customs duty was ever paid on any of the machines. It is conceded by the appellees that the goods never left the supervision, custody and control of U.S. Customs.

None of the copiers assembled in Mexico, including those in question, has ever entered the United States for domestic consumption, and in reality, they could not. That is because

1. All printing and instructions were in Spanish and Portuguese;

2. Many of the machines required 50 cycle electricity, which is not readily available in the United States;

3. Some of the machines did not have Underwriters Laboratory or Canadian Standards Association (UL/CSA) approval;

4. The copiers and their component parts were such that they could not participate in the Xerox "Retrofit" program in the United States, a program Xerox uses to continuously update copiers in service with improvements as they are developed; and

5. Import would require paying customs duties of 5% of the value of the copiers and 5% of the value of technical assistance given to the Mexican operation, which assistance was worth in excess of $7 million.

Accordingly, Xerox contends the machines were constantly in the flow of foreign commerce, and never entered the domestic commerce of the United States or became a part of the common mass of goods within the State of Texas.

Contrary to inferences made by the Texas Court of Civil Appeals, Xerox pays its own way with respect to the services it receives from state and local governments.[2] Indeed, in the City of Houston and County of Harris, Texas, Xerox paid ad valorem taxes of approximately $881,000 and $936,000 in 1976 and 1977, respectively, or a total of $1,817,000, on copiers (other than those in question) which were located there for domestic use. In addition, Xerox has, of course, paid for the services of the common carriers who transported the goods and for the use of the warehouse. All of those payments obviously included a portion used by those entities to pay state and local taxes. Xerox also paid fees for the use of the Port of Houston.

Appellees did not assess ad valorem taxes on the machines stored under customs bond for the years 1974 or 1975. In 1977, the City of Houston (on behalf of itself and the Houston Independent School District) and Harris County (on behalf of itself, the State of Texas and several other local taxing authorities) assessed ad valorem taxes for that year. Harris County also back assessed for the year 1976. Harris County assessed taxes of $104,395.45 for the two years, while the City of Houston assessed $156,728.90 for 1977.[3]

Xerox commenced this action for declaratory judgment on September 30, 1977. In the earliest pleading filed, the original

---

2 In the years in question (1976 and 1977), Xerox paid $215,651,000 and $196,233,000 or a total of $411,884,000 in state and local income, payroll and personal property taxes. See Securities and Exchange Commission, 1977 Form 10K Annual Report, Xerox Corporation, Notes to Consolidated Financial Statements, pp. 6, 19.

3 Xerox' contention that Harris County was estopped from assessing taxes for 1976 because it had been given a letter of exemption by a Deputy County Tax Assessor-Collector was rejected by the court below. Without conceding that the decision below was correct, Xerox abandons that claim here because it does not raise a federal question.

petition (App. p. 28a *infra*), Xerox sought declaratory judgment that the State and local ad valorem taxes in question were "unconstitutional, illegal and void" because they were in contravention of the Import-Export Clause and the Commerce Clause of the United States Constitution, Article I, Section 10, Clause 2 and Article I, Section 8, Clause 3. The trial court, the 165th District Court for Harris County, Texas, upheld that claim and ruled that these taxes were unconstitutional, as applied to the foreign commerce in question (App. p. 11a *infra*).

On appeal to the Texas Court of Civil Appeals, the same constitutional issues were raised when the appellees contended that the taxes were valid despite Xerox' constitutional challenge. That court reversed the trial court, holding that the taxes were valid and not prohibited by the Import-Export Clause (619 S.W.2d at 405-6, App. p. 6a *infra*) and that they were not "repugnant to nor violative of the Commerce Clause of the United States Constitution" (619 S.W.2d at 407, App. p. 8a *infra*).

In its Application for Writ of Error to the Supreme Court of Texas, appellant raised as points of error, *inter alia,* that the Court of Civil Appeals had erred in holding that Xerox' copiers, while stored under customs bond, were subject to State and local ad valorem taxes and that those taxes were valid under the Import-Export and Commerce Clauses of the United States Constitution. The Texas Supreme Court considered that claim and the constitutional ruling of the Court of Appeals in denying the Writ, finding "no reversible error" (App. p.20a *infra*).

THE QUESTION PRESENTED REQUIRES PLENARY CONSIDERATION

The question presented is so substantial as to require plenary consideration with briefs on the merits and oral argument because

1. The only holding of this Court with respect to the applicability of state taxes to goods in customs bonded warehouses is *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414 (1940) (*"McGoldrick"*), where state sales taxes were held unconstitutional as an impingement on the federal regulation of commerce. The court below rejected the applicability of *McGoldrick*. If *McGoldrick* is no longer the law, it should be overruled only after plenary consideration, and not inferentially by a summary affirmance here.

2. Xerox contends that these taxes also are invalid under the Import-Export Clause because its copiers were in transit, never entered domestic commerce and never became part of the common mass of goods within the State. This Court has stated in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976) (*"Michelin"*), that goods in transit are immune from state taxation, but has since indicated that the question of the approach to be taken on goods in transit is one it would prefer to decide with full argument in a case with pertinent facts presented. *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 757, n.23 (1978). This case presents those facts.

3. Having stated in *Michelin, supra* at 290, that the Import-Export Clause prohibits the assessment of property taxes on goods in transit, the Court should decide whether goods held in a customs bonded warehouse for the period of time mandated by Congress, 15 U.S.C. § 1557(a), are "in transit" for these purposes.

4. In light of the enormous value of goods stored and passing through customs bonded warehouses throughout the United States, affirmance would create a new class of taxes which would have a substantial impact on the foreign commerce of the United States, and would seriously impair or destroy the usefulness of the federally mandated system of customs bonded warehouses.

Discussion

1. The McGoldrick Case

Although these copiers remained constantly under the rigid supervision of U.S. Customs, were clearly "in transit" and never entered the domestic commerce of the United States or the common mass of property within the State of Texas, the court below held local ad valorem taxes applicable to them. As might be expected, this is not the first time that a local taxing authority has attempted to tax a customs bonded import-export operation such as that of Xerox. On the only other occasion this Court considered the question it held such a local tax unconstitutional. *McGoldrick v. Gulf Oil Corp., supra.*

In reviewing *McGoldrick,* it is important to recall the role of a customs bonded warehouse in the foreign commerce of the United States. The Commerce Clause of the Constitution (art. I, § 8, cl. 3) gives Congress the "power . . . To regulate commerce with foreign Nations. . . ." The regulation of foreign commerce, therefore, was reserved exclusively for the federal government. In exercising that right, Congress has promulgated, *inter alia,* extensive tariff schedules, levied duties on imported goods, and issued various regulations which are administered by U.S. Customs. For example, Congress has authorized eight different classes of customs bonded warehouses, 19 U.S.C. § 1555, and provided that merchandise can be imported to the borders of the United States and delivered to the supervision and control of U.S. Customs for storage in a customs bonded warehouse. The merchandise can then be

imported into the United States or exported. If exported, it is not subject to customs duties. 19 U.S.C. § 1557(a). During the relevant time period, merchandise could remain in a customs bonded warehouse for three years (now five). 19 U.S.C. § 1557(a). In short, Congress has created a comprehensive system to regulate the flow of foreign commerce through customs bonded warehouses, and its restrictions are stringent.[4] Pursuant to 19 U.S.C. § 1556, regulations have been formulated by the Secretary of the Treasury, including one that adopted the *McGoldrick* decision, stating that "imported goods in bonded warehouses are exempt from taxation or judicial process of any state or subdivision thereof." 19 C.F.R. § 19.6, n.11. This is substantially the same as language that has appeared in customs regulations since 1915. See *McGoldrick, supra* at 426.

In *McGoldrick,* the City of New York was attempting to impose a sales tax on crude petroleum imported from Venezuela, processed into fuel oil in New York, and then sold for export, usually to ships bound for other countries. The operation was in a customs bonded warehouse, and the bonds were conditioned, among other things, upon compliance with various customs laws and regulations. As here, the goods were always segregated from the common goods in the State, and never destined for domestic commerce. *Id.* at 429. The Supreme Court reviewed the federal government's refusal to permit taxation of products under customs bond and struck down the attempted local taxation as repugnant to the Commerce Clause of the Constitution.

---

4 For example, the warehouse must first be bonded; it must meet certain physical specifications; it cannot be physically altered or discontinued without the permission of U.S. Customs; the warehouse is obligated to give U.S. Customs a written list of all employees handling imported merchandise and to advise U.S. Customs of their termination; it is under the constant supervision of a U.S. Customs warehouse officer; and when any merchandise in bond is to be shipped, it shall be done only upon receipt of a permit signed by the U.S. Customs officer. 19 C.F.R. §§ 19.1-19.6.

The situation here is exactly that posited in *McGoldrick*. In 19 U.S.C. § 1557(a), Congress mandated that goods which are imported and held in customs bonded warehouses "may be withdrawn for exportation or for transportation and importation to a foreign country . . . without the payment of duties thereon. . . ." That statute is but part of a comprehensive set of statutes and regulations, including those promulgated by the Secretary of the Treasury pursuant to 15 U.S.C. § 1556. The conclusion here, we submit, should be as in *McGoldrick*.

> The Congressional regulation, read in the light of its purpose, is tantamount to a declaration that in order to accomplish constitutionally permissible ends, the imported merchandise shall not become a part of the common mass of taxable property within the state . . . and shall not become subject to the state taxing power. *Id.* 309 U.S. at 429.

Appellees and the court below cite no valid reasons in law or fact to distinguish the instant case from *McGoldrick,* which has expressed this Court's position on the applicability of state taxes to customs bonded merchandise. Many of the facts in this case which appellees claim distinguish it from *McGoldrick* were present in *National Distillers Products Corp. v. City and County of San Francisco,* 141 Cal. App. 2d 651, 297 P.2d 61, *cert. denied,* 352 U.S. 928 (1956). There, as here, the State sought to enforce ad valorem taxes on goods other than petroleum (liquor) stored in a customs bonded warehouse. The court held the taxes unconstitutional in light of *McGoldrick,* and in rejecting claims that the goods in question were subject to such taxation, succinctly stated that the goods

> . . . derive their immunity from local taxation under the commerce clause by reason of the fact that the federal government has regulated their manufacture, transportation, storage, and exportation in furtherance of commerce, and that such taxes would constitute an interference with that regulation. *Id.* 297 P.2d at 61.[5]

---

5 The distinctions drawn by the appellees and the Texas Court of Civil Appeals do not create a difference. Clearly while this is an ad valorem

Finally, even in the case relied on by appellees, *American Smelting & Refining Co. v. County of Contra Costa,* 271 Cal. App. 2d 437, 77 Cal. Rptr. 570, *appeal dismissed,* 396 U.S. 273 (1969), State ad valorem taxes were rejected when, as here, the merchandise in question (ore) was destined for foreign commerce. 77 Cal. Rptr. at 601. It is clear that whether the product involved is the oil in *McGoldrick,* Natural Distillers' liquor, American Smelting's ore or Xerox' copiers, Congress' regulation of foreign commerce with respect to them is no less complete. The state taxes on these goods, while in customs bonded warehouses, are unconstitutional.

Summary affirmance here would reject *McGoldrick* and create a clear conflict in the Court's holdings as to the state taxation of customs bonded goods. Xerox submits that *McGoldrick* is alive, viable and controlling. If the Court decides *McGoldrick* is no longer the law, so be it; but if so, we submit that it should be overruled only after full plenary consideration. Otherwise its existence side by side with an affirmance of this case would create an anomaly in the Court's holdings.

2. The Michelin Case

Xerox contends that these taxes, as applied, are unconstitutional and in violation of the Import-Export Clause, because no state may "levy any Imposts or Duties on Imports or Exports. . . ." U.S. Const. art. I, § 10, cl. 2. The court below sought to validate these taxes as not being repugnant to that clause of the Constitution through a reading of *Michelin Tire Corp. v. Wages,* 423 U.S. 276 (1976). Michelin had imported tires and tubes from abroad, cleared United States customs

---

tax rather than a sales tax, it still places an unconstitutional burden on federally regulated foreign commerce. And while *McGoldrick* focused on the regulation of petroleum imports and exports, and their use as ships stores, those regulations were part of the same overall regulation of foreign commerce at issue here. The language of customs regulations may have evolved over the years, but it is no less pervasive today than it was in 1940, and is designed to protect *all* goods located in customs bonded warehouses, including Xerox' copiers.

and paid duty. It then trucked them to its warehouse in Georgia, where they were unloaded, sorted and stored, awaiting orders from dealers. They were not in a customs bonded warehouse and were destined for domestic sale. This Court reviewed the history of the Import-Export Clause, starting with its reasons for being included in the Constitution and tracing its subsequent history. Before *Michelin* the cases almost uniformly followed the "original package" test, holding that as long as the imported product remained in its original package, it was still in foreign commerce and not subject to local taxation.[6] The Court concluded that the "original package" test was not alone determinative, but held that imports were *not* subject to local taxation as long as they were in transit. It went on to suggest, in determining whether state taxes were prohibited "Imposts or Duties", that an analysis be made to determine if they offended any of three policy considerations; namely, that 1) the federal government must speak with one voice in regulating foreign commercial relations; 2) import revenue of the federal government cannot be diverted to the states; and 3) harmony among the states might be disturbed unless states with ports of entry were prohibited from taxing goods merely flowing through their ports. *Id.* at 285-86.

Whatever the result of an application of the *Michelin* criteria to these copiers (and Xerox believes that even under an analysis using the *Michelin* criteria, the taxes violated at least the first and third criteria and are invalid), the fact is that the *Michelin* test does *not* apply, for as the Court said at three separate places in the opinion, the Constitution prohibits "the assessment of even non-discriminatory property taxes on goods which are merely in transit through the State when the tax is assessed". *Id.* at 290. See also 423 U.S. at 286 and 302. As is demonstrated *infra,* Xerox' goods were in transit, and there-

---

6 *Brown v. Maryland,* 25 U.S. (12 Wheat.) 419 (1827); *Low v. Austin,* 80 U.S. (13 Wall.) 29 (1872); *Hooven & Allison Co. v. Evatt,* 324 U.S. 652 (1945); and *Youngstown Sheet & Tube Co. v. Bowers,* 358 U.S. 534 (1959).

fore never became part of the common mass of goods within the State which would be subject to taxation.

We submit that since Xerox' goods were in transit, the purported *Michelin* analysis is not valid and the goods are exempt from State taxation. However, the Court itself subsequently has raised the issue of the applicability of that analysis to goods in transit, and invited a plenary hearing of that question. In *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies,* 435 U.S. 734 (1978), the Court extended the *Michelin* test, and approved State taxation of interstate stevedoring activities, noting, however, that the tax was on an *activity* and not the *goods* themselves. The Court concluded "that the Michelin policy analysis should not be discarded merely because the goods are in transit, at least where the taxation falls upon a service distinct from the goods and their value." *Id.* at 757. It said, however, that it was not deciding the issue raised here:

> We do not reach the question of the applicability of the Michelin approach when a State directly taxes imports or exports in transit.
>
> Our brother Powell, as his concurring opinion indicates, obviously would prefer to reach the issue today, even though the facts of the present case, as he agrees, do not present a case of a tax on goods in transit. As in Michelin, decided less than three years ago, we prefer to defer decision until a case with pertinent facts is presented. At that time, with full argument, the issue with all its ramifications may be decided. *Id.* at 757, n.23.

Xerox submits that this case presents the pertinent facts upon which the Court may decide the question.

3. "In transit"

Grounding the error below is the lower court's decision concerning the status of the goods when taxed. It extended constitutional criteria beyond their intended limits. In one

place, the criteria cited as to whether the goods were "in transit" were: a) was there stoppage; b) was the final destination determinable; and c) was it for the business purpose of the shipper; citing *Independent Warehouses, Inc. v. Scheele,* 331 U.S. 70 (1947); *Michelin Tire Corp. v. Wages, supra;* and *Calvert v. Zanes-Ewalt Warehouse, Inc.,* 502 S.W.2d 689 (Tex. 1973).

At another point in the decision, the court reasoned that under *Kosydar v. National Cash Register Co.,* 417 U.S. 62 (1974), the goods were not immune from taxation because export had not started. Finally, the court claimed that State taxes could be applied where the goods were imported and warehoused at the owner's convenience until a sale was obtained and the goods were exported, citing *Bacon (Wabash Elevator) v. Illinois,* 227 U.S. 504 (1913); *Susquehanna Coal Co. v. City of South Amboy,* 228 U.S. 665 (1913); and *Michelin Tire Corp. v. Wages, supra.*

The significant feature absent in *all* of those cases is the customs bonded warehouse. Appellees have conceded that Xerox' goods never left the supervision, custody and control of U.S. Customs. They were always kept in facilities where, pursuant to federal regulation, 19 C.F.R. § 19.2(c), they were carefully segregated from domestic commerce. And it is conceded that they never entered domestic commerce, but were shipped abroad. It is only if, as, and when Xerox paid the required customs duties that these goods would leave the federal enclave created by the customs bonded warehouse and enter the common mass of goods within the State. Until then, they were as surely in foreign commerce and beyond the reach of State taxation as if they had remained on the loading dock in Mexico City. In all of the cases cited by the court below, however, the import or interstate journey had ceased or the export journey had not yet begun. Thus, in each case, the goods had settled into the common mass of goods within the State, and therefore had some connection with the State for taxation purposes. Here, however, they were under federal

custody, and had not become part of the State's common mass of property. In short, they had no nexus with the State of Texas.

The length of time these goods may remain in the customs bonded warehouse has been mandated by Congress, which stated that they may remain for three years (now five) without the imposition of duty, and if transshipped within that time, as happened here, no duty applies. 19 U.S.C. § 1557(a). Whatever period of time it chose, Congress has stated the permissible period that these goods may remain in foreign commerce, and, as this Court has consistently held, it is for Congress, and not local taxing authorities, to determine the indicia of foreign commerce. *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979); *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies, supra.* However long they stayed, they were always in federal custody, bound for foreign destinations.

The only case cited as being contrary to Xerox' position is *American Smelting & Refining Co. v. County of Contra Costa, supra,* 271 Cal. App. 2d 437, 77 Cal. Rptr. 570, *appeal dismissed,* 396 U.S. 273 (1969). No federal court has addressed the issue. But there, while the California court permitted State taxation of goods that were held in bond and ultimately entered *domestic* commerce, it held that where, as here, the goods were for re-export, Congress had preempted the field, the goods did not have a nexus to the State and the State tax could *not* be applied.

This Court, we submit, should not, by summary affirmance of the opinion below, put new limits on the definition of "in transit", and permit decisions applicable to goods that either are, or are destined to be, part of the common mass of goods within the State to be extended to embrace goods in the custody of the federal government and which never leave foreign commerce.

4. National Significance

Summary affirmance would substantially alter the relationship between the states and the federal government, and would open the door to the imposition by state and local governments of substantial burdens on the foreign commerce of the United States. The $9 million worth of copiers that Xerox stored in a customs bonded warehouse is but a microcosm of what is undoubtedly hundreds of millions of dollars worth of goods similarly stored throughout the country. With the advent of modern air transportation, customs bonded warehouses may exist in every state. The merchandise stored in them could be subjected to a myriad of new state taxes as a result of affirmance. Moreover, affirmance here would, without more, substantially change the value of customs bonded warehouses, limiting and perhaps destroying their usefulness in foreign commerce. This case merits plenary treatment, as it presents an important question touching on the accommodation of state and federal interests under the Constitution. *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 65 (1974).

We submit that where, as here, summary affirmance would substantially conflict with existing law, change the existing federal-state relationship and impact the businesses of thousands of citizens of the United States, as well as our relationships with foreign governments and business entities, the case merits full plenary consideration, on a full record, with briefs and oral argument.

CONCLUSION

For the reasons set forth above, it is submitted that this Court has jurisdiction, and that the question presented is one requiring plenary consideration.

Respectfully submitted,

ALFRED H. HODDINOTT, JR.
800 Long Ridge Road
Stamford, Connecticut 06904
(203) 329-8700

Counsel for Appellant

February 9, 1982

Appendix

1.

Opinion of Texas Court of Civil Appeals, 619 S.W.2d 402

COUNTY OF HARRIS, Texas et al.,

Appellants,

—v.—

XEROX CORPORATION,

Appellee.

No. 17862

Court of Civil Appeals of Texas,
Houston (1st Dist.)

April 30, 1981

Rehearing Denied May 21, 1981

Joe Resweber, Paul Bibler, Edward Cazares, Cheryl Helena Chapman, Houston, for appellants.

Larry D. Thompson, William K. Luyties, Houston, for appellee.

Before COLEMAN, C.J., and SMITH and REDEN, JJ.

SMITH, Justice.

This is a declaratory judgment suit filed by Xerox Corporation requesting the court to declare unconstitutional certain ad valorem taxes assessed against it by the City of Houston, the Houston Independent School District, Harris County, and the State of Texas, and seeking injunctive relief. The trial court entered judgment declaring the taxes unconstitutional and enjoined the collection of the taxes.

The question presented in this case is whether nondiscriminatory ad valorem taxes assessed by state and local taxing authorities are violative of the commerce clause and the import-export clause of the United States Constitution where assessed against imported property stored in local customs bonded warehouses awaiting sale and shipment to a foreign country.

Xerox is incorporated under the laws of the State of New York and is authorized to transact business in the State of Texas. It is a manufacturer and seller of copier machines, engaging in both domestic and international commerce. It has affiliate companies in several foreign countries for the purpose of meeting certain governmental requirements of the respective countries as well as gaining certain benefits.

In the instant case Xerox manufactured its parts in Colorado and New York and transported these parts to a warehousing facility in Rochester, New York. To meet the requirements of the Latin American Free Trade Association (LAFTA),[1] Xerox established an affiliate company in Mexico City to assemble copiers which would be functional in countries whose national language was either Spanish or Portugese.

To get parts to its Mexican affiliate, Xerox shipped its unassembled parts from Rochester to Laredo, Texas, and thence, by truck, to Mexico City, where the machines were set up and adjusted by Mexican labor trained for this purpose.

Mexican tax laws made the warehousing of the copiers in Mexico economically unfeasible; therefore, Xerox, up to the year of 1974, shipped its assembled copiers to the Free Trade Zone of Panama, where it had to pay no taxes on its warehoused merchandise.

In 1974, the Panamanian government and its people became hostile to American companies. Xerox made the decision not to jeopardize its merchandise in Panama and, after a search for another warehousing facility, decided to ship its products to Houston, Texas, because of its excellent port facilities.

---

1 LAFTA is a group of Latin American countries who associated themselves for the purpose of regulating imports into their respective countries and adopting certain policies to implement the purpose of the association.

Xerox shipped the assembled copiers under bond from Mexico City by truck to Nuevo Laredo. The copiers were brought across the border under bond and placed in customs bonded warehouses. The machines were then transported by bonded trucking companies from Laredo to Houston, where they were placed in customs bonded warehouses. The uncrated machines remained in the warehouses, segregated from other merchandise, until Xerox obtained a sale. When a sale was obtained, the packaged machines were removed from the warehouse under bond and remained under bond until placed aboard a deep-water shipping vessel at Houston or Miami, to be transported to a Latin American company. No import taxes were ever assessed against these imported copiers by the United States.

Xerox maintained other warehouses in Houston for copiers that were to enter domestic commerce, and ad valorem taxes were paid on these. None of the imported copiers from the customs bonded warehouses were ever sold to customers for domestic use. No taxes were assessed on the imported machines by the local taxing authorities against Xerox in 1974 and 1975. In 1976, upon request from Xerox, Harris County, Texas, through an authorized deputy of the Tax Assessor-Collector, issued an exemption on the imported warehoused merchandise located in Houston. In 1977 the City of Houston[2] assessed taxes on the imported warehoused copiers and Harris County[3] followed by assessing taxes for 1977 and back assessing for the year of 1976.

In this suit we are concerned about the taxes for years 1976 and 1977 only, for the reason that as soon as Xerox was apprized that it was being assessed taxes on its imported copiers, it shipped all such merchandise to Buffalo, New York, a free trade zone location.

On assessment dates, January 1, 1976 and 1977, virtually none of the copiers in the warehouse had been sold or

---

2 The City of Houston assesses and collects taxes for itself and the Houston Independent School District.

3 Harris County assesses and collects taxes for itself, the State of Texas and several other local taxing authorities.

otherwise committed and none had been consigned to a common carrier. The length of time in storage varied from a few days to three years. The two model lines most numerously stored averaged seven and one-half months for one and twenty-five months for the other.

The parties agree that the ad valorem taxes levied were uniform non-discriminatory taxes on property, not based on origin or destination of goods. There is no claim by Xerox that the taxes were, in any manner, not properly assessed, except that they were unconstitutional as applied to the copiers in question.

The appellants assert as their first point of error that the trial court erred in finding that the copiers were not subject to state and local ad valorem taxation under the import-export clause of the United States. We agree.

Article I, Section 10, clause 2 of the United States Constitution, commonly referred to as the "import-export" clause, states as follows:

> No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection law . . .

Section 8 of Article I of the United States Constitution commences by stating: "The Congress shall have the power to lay and collect taxes, duties, imposts and excises . . . ." It is manifest that the framers of the United States Constitution were addressing specific problems in limiting Section 10, clause 2 of Article I to "imposts and duties." The words "taxes" and "excises" are conspicuous by their absence from this section.

The position of Xerox in this suit was the law of the land, prior to 1976. *Brown v. Maryland,* 12 Wheat. 419, 6 L.Ed. 678 and *Low v. Austin*, 13 Wall. 29, 20 L.Ed. 517. However, in that year the United States Supreme Court in *Michelin Tire Corporation v. Wages,* 423 U.S. 276, 96 S.Ct. 535, 46 L.Ed.2d 495, overruled *Low v. Austin* and held that a nondiscriminatory ad valorem tax did not infringe upon the import-export clause where the imported goods were no longer in transit.

Immediately thereafter, the Texas Supreme Court, relying on *Michelin,* reversed its holdings in *City of Farmers Branch, et al. v. Matsushita Electric Corporation of America*, 537 S.W.2d 452, 454 (1976) and in *City of Farmers Branch, et al. v. American Honda Motor Company, Inc.*, 537 S.W.2d 454 (1976) and held that "The ad valorem tax imposed by Farmers Branch is clearly nondiscriminatory and applicable to all such stored goods whether imported or not."

The question then arises, were the copiers involved in our suit still in transit? We think they were not.

The courts have established criteria to determine whether goods are in transit, i.e. (1) was there a stoppage in transportation, and, if so, what was the purpose of the stoppage? (2) at the time of taxation was the final destination of the goods determinable? and (3) was the stoppage a necessary delay or accommodation to the means of transportation, or for business purposes and profits of the company? See *Independent Warehouses v. Scheele,* 331 U.S. 70, 67 S.Ct. 1062, 91 L.Ed. 1346 (1947); *Michelin Tire Corporation v. Wages, supra; Calvert v. Zanes-Ewait Warehouse, Inc.,* 502 S.W.2d 689 (Tex.1973).

Applying these criteria, we find that there was a transportation stoppage of the warehoused copiers and that such stoppage was occasioned for business purposes of Xerox; that on taxation day the final destination of the goods was not determinable, as the property had not been sold or committed to further transportation; and that the business purpose in stoppage was profits for Xerox. We hold the warehoused Xerox copiers were no longer in transit.

The appellee also urges that the copiers were in the custody of customs officials stored in customs bonded warehouses, and that under such circumstances the federal government has preempted local taxing authorities by taking sole control. We cannot concur in this view. The California courts in *American Smelting and Refining Company v. The County of Contra Costa,* 271 Cal.App.2d 437, 77 Cal.Rptr. 570 (1969) held contrary to Xerox's position and the Federal courts have not set aside or overruled that opinion. We are of the opinion and so hold that the storing of imported goods in a customs

bonded warehouse in and of itself does not preclude local authorities from assessing and levying a nondiscriminatory ad valorem tax under the import-export clause of the United States Constitution absent Federal legislation or regulation to the contrary.

Appellee further asserts that its inventory of copiers is exempt because they are exports. This contention was rejected in *Kosydar v. National Cash Register Company,* 417 U.S. 62, 94 S.Ct. 2108, 40 L.Ed.2d 660 (1974), wherein the Supreme Court set forth the test that the movement to foreign shores must be started or committed to be moved for an export to be exempt from taxation. There being no sale or commitment to sell and no movement or commitment to move, the export exemption does not apply in this case.

Appellants' first point of error is sustained.

The appellants' second point of error asserts that the trial court erred in concluding that the property was not subject to nondiscriminatory ad valorem taxes under the Commerce Clause of the United States Constitution.

Article I, Section 8, clause 3 of The United States Constitution, commonly referred to as the Commerce Clause, states as follows:

> Congress shall have the power "To regulate Commerce with Foreign Nations, and among the several states, and with Indian Tribes."

The commerce clause confers specific authority upon the United States Congress, however it should be noted that the conferral of authority and the exercising of that authority are distinct and separate matters.

Xerox asserts that *McGoldrick v. Gulf Oil Corporation,* 309 U.S. 414, 60 S.Ct. 664, 84 L.Ed. 840 (1940), is dispositive of the appellants' second point of error. We believe the cases are distinguishable. In *McGoldrick* the Supreme Court concluded that a New York sales tax upon oil imported to be refined and sold to foreign bound vessels was preempted by congressional legislation and invalid. Congress has not exercised its prerogative in such a manner as to preclude ad valorem taxes on goods

such as the copiers involved in this case, even though it has authority to do so. It should be noted, however, that as a result of *Low v. Austin,* 13 Wall. 29, 80 U.S. 29, 20 L.Ed. 517 (1871), there is a footnote in the Code of Federal Regulations, 19 C.F.R. § 19.6(c), which states that "Imported goods in bonded warehouses are exempt from taxation or judicial process of any state or subdivision thereof." This footnote is not a regulation and as pointed out in *American Smeltering,* supra, *Michelin* overruled *Low* and the footnote has no more weight than the precedent upon which it rests. Suffice it to say, the *McGoldrick* decision was based on specific congressional legislation and, as noted above, no comparable legislation has been enacted that would prohibit taxation in this case.

Xerox takes the position that the most important purpose of the Commerce Clause and the Import-Export Clause is to prohibit state taxation from having any impact on the federal government's regulation of foreign commerce. We have no quarrel with this statement, in fact we agree that the federal government should speak with one voice in its regulation of foreign commerce. We are aware that local taxation will increase the cost of the product in the market place, be it a domestic or foreign market. The ability to compete in price is essential in the market place. Xerox has dropped from 95% of the Latin American copier market in 1976 to 74% in 1979, and in some countries its share has dropped to 40%. The bulk of the lost business has gone to Japanese competitors. We are not unaware that this same problem has occurred in automotive, television, radio, steel and many other industries. But the fact remains that the United States Congress has chosen not to enact legislation to protect the copier industry as it did for the oil industry in the *McGoldrick* case. The courts cannot enlarge legislation, nor can they legislate.

In this case the taxing authorities have furnished Xerox with port facilities, police and fire protection, streets for ingress and egress, and may other services, and the taxes represent the *quid pro quo.* Such taxes do not hamper, impede, nor deprive the federal government of its exclusive regulation of foreign commerce. *Michelin Tire Corporation v. Wages,* supra. Too, we find no fact findings that the taxes would impair Xerox's

ability to compete in the foreign market, and the question of multiple taxation is not raised. See *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979).

Absent Federal Legislation or regulation to the contrary, we hold that a nondiscriminatory ad valorem property tax is not repugnant to nor violative of the commerce clause of the United States Constitution, where the domestic owner of property imports such property and warehouses it for the owner's convenience until such time as a sale may be obtained and the property exported. *Wabash Elevator v. People Of The State of Illinois,* 227 U.S. 504, 33 S.Ct. 299, 57 L.Ed. 615 (1913), *Susquehanna Coal Co. v. City of South Amboy,* 228 U.S. 665, 33 S.Ct. 712, 57 L.Ed. 1015 (1913), *Michelin v. Wages,* supra.

Xerox in its only cross-point alleges Harris County is estopped, as a matter of law, from making claim for taxes on the imported copiers stored in bonded warehouses in Harris County on January 1, 1976. The basis for such assertion is that Xerox requested and received from Harris County a letter[4] of

---

4.

August 9, 1976

Xerox Corporation
Xerox Square
Rochester, N.Y. 14644

Attention: Mr. Ricardo S. Perez
International Traffic Manager
Building 822

Dear Mr. Perez:

Thank you for your affidavit dated July 27, 1976. Please be advised that this inventory will be carried as Exempt, in as much as it was stored in Bond on January 1, 1976.

Sincerely,

Carl S. Smith
Tax Assessor-Collector

By:H. F. Bruce
Deputy

HFB:bwe

exemption for that year. H.F. Bruce was an appointed deputy for the duly elected Tax Assessor-Collector for Harris County, Texas and was the deputy who ordinarily handled matters of exemption in that office. Carl S. Smith, the Tax Assessor-Collector, stated that Mr. Bruce handled these matters, but in questionable matters such as this Mr. Bruce ordinarily conferred with him. Mr. Smith further stated that he had no recollection of Mr. Bruce's discussing the matter with him and that the letter was sent out erroneously.

The general rule has been in this state that when a unit of government is exercising its governmental powers, it is not subject to estoppel. *City of Hutchins v. Prasifka,* Tex., 450 S.W.2d 829 (1970). Chief Justice Greenhill in his opinion in *Prasifka* noted, ". . . That a municipality may be estopped in those cases where justice requires its application and there is no interference with the exercise of this governmental function. But such doctrine is applied with caution and only in exceptional cases where the circumstances clearly demand its application to prevent manifest injustice."

In this case the taxing date was January 1, 1976. Xerox filed its inventory and evaluations as of that date. Xerox filed its request for exemption July 27, 1976 and the date of Mr. Bruce's exemption letter was August 9, 1976. We are of the opinion that no manifest injustice has occurred in this case. Xerox did not move its copiers into Harris County in reliance on such letter and there is no allegation of fraud or deceit by Xerox against Harris County officials.

Appellees cross-point is overruled.

Appellants by their third, fourth and fifth points of error complain that the injunctive relief granted by the trial court fails to comply with Rule 683, Tex.R.Civ.Proc., in that it (1) does not identify the parties enjoined (2) does not state the reason for the issuance of the injunction (3) does not identify the property involved, and (4) could be construed as operating for future taxes. Our disposition of previous points of error makes these objections irrelevant; but, we agree with these contentions, and, in the event we are held on appeal to have erred in our holdings, we suggest that the Judgment be re-

manded to the trial court to reform the injunctive portions of the judgment to comply with the requirements of Rule 683, T.R.C.P.

The judgment of the trial court is reversed and rendered that Xerox take nothing, that Harris County have judgment against Xerox in the sum of $131,311.97 plus penalties and interest for the tax years of 1976 and 1977, that the City of Houston have judgment for itself and the Houston Independent School District in the sum of $156,728.90 plus penalties and interest for the tax year of 1977, and that the injunction issued by the trial court is dissolved and set aside. Costs of appeal are charged to the appellee, Xerox.

COLEMAN, C.J., and PEDEN, J., sitting.

2.

Opinion of the District Court for the 165th District, Houston, Texas

[SEAL]

LYNN N. HUGHES
Judge, 165th District Court
Houston Texas, 77002

July 14, 1980

Mr. Larry D. Thompson
Thompson, Lorance & Wittig
303 Jackson Hill, Suite 300
Houston, Texas 77007

RE: Xerox Corp. v. Harris County, et al.
Cause No. 1,146,343

Dear Mr. Thompson:

I have determined that the plaintiff is entitled to judgment in this case.

The copiers began as components manufactured by Xerox and others in this country and by others in Mexico. The American-made components were exported to Mexico where they were assembled into copiers, also incorporating Mexican-made parts. The assembled copiers were exported from Mexico and held in Houston awaiting importation for consumption in an importing Latin America country by a marketing operation of Xerox. On the tax dates, the copiers were present in Houston in a bonded warehouse in the joint possession of the warehouseman and the U.S. Customs Service under federal law. At the time, they were destined for Latin America; they were being neither imported to the U.S. nor exported from the U.S. Although it apparently was legally and practically possi-

ble to import the copiers, domestic consumption was not indicated by Xerox's corporate intent as verifiable by all the objective indications nor by the eventual disposition of these copiers.

The copiers occupied a place both in the federal regulatory scheme and in foreign commerce similar to the ore-*cum*-metal that was "committed to reexport" in *American Smelting & Refining Co. v. County of Contra Costa,* 271 Cal. App.2d 437, 77 Cal. Rptr. 570 (1969), *appeal dismissed,* 396 U.S. 273 (1970), and to the fuel oil that was committed to consumption as ship's stores in *McGoldrich v. Gulf Oil Corp.,* 309 U.S. 414 (1940).

Good stored under a Customs bond may be subject to state taxation if in the process of importation they become functionally indistinguishable from the common property in the state, with the operative fact not being the warehouse bond but the termination of the process of foreign commerce and the entry of the good into domestic commerce. *State v. Harper,* 188 S.W.2d 400, (Tex.Civ.App.—San Antonio 1945, no writ), *cert. denied,* 327 U.S. 805 (1945); *City of Farmers Branch v. Matsushita Electric Corporation of America,* 537 S.W.2d 452 (Tex. 1976). Given the peculiar status of the copiers in the factual context of foreign commerce, they are not taxable because they do not have a substantial nexus with Houston and have not left the palpable flow of foreign trade.

This case may also raise this question: If under the federal law governing the copiers' presence in Houston they are immune from the possessory process of the Texas courts, are they not also outside the power of Texas to subject them to possessory taxes since their legal situs (as opposed to their physical presence) determines they incidence of the ad valorem tax? 19 U.S.C., § 1484 j; 19 C.F.R., § 19.6 fns. 10, 11; *Guaranty Life Insurance Co. of Houston v. City of Austin,* 108 Tex. 209, 190 S.W. 189 (1916); *Greyhound Lines, Inc. v. Board of Equalization,* 419 S.W.2d 345 (Tex. Civ. App.—Amarillo 1965, writ ref'd n.r.e.). [The effectiveness of the

federal exemption of goods in bond from state court process was litigated in *J. Henry Schroder Banking Corp. v. Schultz,* 373 F.Supp. 1283 (S.D. Tex. 1974), *remanded as moot,* 560 F.2d 1192 (5th Cir. 1977), with the issue not being addressed in the appellate decision and being unclearly presented in the trial court.]

The copiers may have a status that prevents them from having any situs; "they may acquire no tax situs in any of the states at which they touch port, and are taxable by the domicile or not at all." *Northwest Airlines, Inc. v. Minnesota,* 322 U.S. 292, 314 (1944) J. Jackson dissenting in an instrumentalities case.

The copiers' presence in Houston was solely and deliberately the result of a federal foreign trade legal fiction. Even if the regulatory provisions of the national government was not clearly directed to the precise present-but-not-imported situation in this case there is an effect on the Commerce Clause's interest in foreign trade; the tax is not "valid so long as it interfers with no Act of Congress or treaty of the United States" because "it may properly be called 'international.' " *Henderson v. Mayor of New York,* 92 U.S. 259, 274 (1875). In any event, the Congress and the Treasury have spoken with sufficient pertinence (no matter how opaquely) to place these copiers into the stream of federal preemptive foreign commerce regulation to eliminate the power of domestic local governments to tax them. See the alternative holding in *Japan Line Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979) and, of course, *Gibbons v. Ogden,* 22 U.S. 1 (1824).

Please prepare a proposed judgment, circulate it for endorsement by counsel, and send it to me for signing. If counsel do not agree, each shall file a proposed judgment immediately.

Yours very truly,

Lynn N. Hughes
District Judge

LNH/sb

Copies: Mr. Paul Bibler, Jr.
Assistant County Attorney
Office of the County Attorney
1001 Preston, Suite 634
Houston, Texas 77002

Ms. Cheryl Helena Chapman
Assistant City Attorney
Office of the City Attorney
Post Office Box 1562
Houston, Texas 77001

3.

Amended Findings of Fact and Conclusions of Law of the District Court for the 165th District, Houston, Texas

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS

165th Judicial District

NO. 1,146,343

XEROX CORPORATION

—VS.—

COUNTY OF HARRIS, TEXAS, *et al.*,

AMENDED FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Pursuant to the requests by the CITY OF HOUSTON and HARRIS COUNTY, the Court hereby states its amended findings of fact and conclusions of law in the above referenced matter.

I.

FINDINGS OF FACT

1. XEROX CORPORATION (hereinafter referred to as XEROX) is incorporated under the laws of New York, is doing business in Houston, Harris County, Texas and is a manufacturer, seller and lessor of copier machines in both domestic and international commerce.

2. The CITY OF HOUSTON is a duly authorized tax authority in the State of Texas and is authorized by statute to collect taxes in its own behalf and on behalf of the Houston Independent School District.

3. HARRIS COUNTY is a duly authorized taxing authority in the State of Texas and is authorized by statute to collect taxes in its own behalf and on behalf of the State of Texas, the Harris County Flood Control District, the Port of Houston Authority, the Harris County Board of School Trustees, and the Harris County Hospital District.

4. At all relevant times, XEROX had copier machines in Houston, Harris County, Texas for its domestic business. The ad valorem taxes on these copiers are not in dispute.

5. Pursuant to its international business and in particular to its trade and commerce with Latin America and the Caribbean, XEROX, on tax day, January 1, of the years 1976 and 1977, leased Customs bonded storage space in the Houston Terminal Warehouse in Houston, Texas, for temporary warehousing of its copiers which were destined for eventual use in Latin America and the Caribbean.

6. The copiers in question were all stored under customs bond in the Houston Terminal Warehouse, a privately owned public warehouse, which at all material times was a Class III Customs bonded warehouse.

7. The fair market value of said copiers located in the Houston Terminal Warehouse on January 1, 1977 was $9,015,685.00, and on January 1, 1976 was $9,051,586.00.

8. On January 1, 1977 XEROX had 4,248 copiers stored in Customs bond at Houston Terminal Warehouse; the number is fairly representative of the average number of copiers in the Houston Terminal Warehouse during 1976 and 1977.

9. The Houston Terminal Warehouse was, at all material times, a Class III Customs bonded warehouse, pursuant to 19 USCA 1555 and 19 USCA 1557(a) as well as the rules and regulations promulgated by the Secretary of the Treasury, Title 19 C.F.R. 19.01, et seq. The copiers were in the Houston Terminal Warehouse pursuant to these laws and regulations.

10. The copiers were assembled in Mexico of component parts largely manufactured in the United States and which

were shipped from the United States to the Mexican corporate affiliates of XEROX in Mexico City.

11. Each individual copier was individually packaged and remained in its original Mexican export packaging while in Houston.

12. The copiers were shipped from Mexico City to the United States border where, after the appropriate documents were executed, the copiers were surrendered to the supervision and control of the United States Customs Service and were transferred by a customs bonded trucking company to the Houston Terminal Warehouse.

13. At all times while in the United States, including while in the Houston Terminal Warehouse, the copiers remained in Customs bond and continuously under the control, supervision, and custody of the United States Customs Service.

14. The copiers were held in Houston pending orders from XEROX affiliates in Latin America and the Caribbean to meet sales demands in these areas.

15. The copiers were then transferred, under customs bond and customs supervision and control, to transportation facilities such as Port of Houston or Miami where they were, in every case, shipped to Latin America or the Caribbean.

16. The copiers were free from United States custom duties and tariffs during their presence in Houston, pursuant to 19 USCA 1555 and 19 USCA 1557(a), and no customs duty has ever been paid by XEROX on said copiers.

17. None of the copiers stored at the Houston Terminal Warehouse by XEROX have ever been consumed domestically and had never entered the United States market. All copiers have been used exclusively in Latin America and the Caribbean, and none of the copiers have ever returned to the United States.

18. If the copiers were used in the United States, XEROX would have to pay United States customs duties amounting to five percent of the value of the copiers.

19. The copiers could have been modifed for domestic consumption but other aspects of marketing, including servicing, would have made domestic sales economically impractical.

20. XEROX, at all material times, was facing aggressive competition in the Latin American and Caribbean market.

21. XEROX used the Houston Terminal Warehouse facility and the laws of the United States which allowed for duty free importation and re-exportation pursuant to 19 USCA 1555 and 19 USCA 1557(a) to take advantage of the competitive advantage allowed by such laws so that it could more effectively compete in the Latin American and Caribbean market.

22. XEROX, during the year 1976, filed a request with the county for exemption from ad valorem taxes on the copiers stored in the Houston Terminal Warehouse on January 1, 1976.

23. HARRIS COUNTY, in a letter dated August 9, 1976 and written by H. F. Bruce, Deputy Tax Assessor-Collector of Harris County, who had the authority to write the letter, advised XEROX that the copiers would be exempt for the tax year 1976.

24. The taxes assessed and levied on the copiers by the CITY OF HOUSTON, for its own use and for the use and benefit of the Houston Independent School District, for the year 1977 was $156,728.90.

25. The taxes assessed and levied on the copiers by HARRIS COUNTY, for its own use and for the use and benefit of the State of Texas, the Harris County Flood Control District, the Port of Houston Authority, the Harris County Board of School Trustees, and the Harris County Hospital District, were as follows:

(a) $55,969.39 for the year 1977;
(b) $48,426.06 for the year 1976.

26. The ad valorem tax on personal property levied by the CITY OF HOUSTON and HARRIS COUNTY is a uniform tax on

property that does not discriminate on the origin or destination of goods.

27. On January 1, 1976 and 1977 the copiers stored at the Houston Terminal Warehouse had not been consigned to a common carrier.

II.

CONCLUSIONS OF LAW

1. The copiers owned by XEROX and located at the Houston Terminal Warehouse on January 1, 1976 and on January 1, 1977 were not subject to state or local ad valorem taxation on personal property under the United States Constitution, Article I, Section 8, Clause 3, and Article I, Section 10, Clause 2.

2. With the exception of the negligible number of copiers previously committed to sale, XEROX was not bound by any laws, either State or Federal, to export the copiers to Latin America.

SIGNED this 27th day of October, 1980.

/s/ LYNN N. HUGHES
Judge Presiding

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy was mailed, certified mail, return receipt requested, postage prepaid, on this 24th day of October, 1980, to Mr. Larry D. Thompson, Attorney for the Plaintiff, 303 Jackson Hill, Suite 200, Houston, Texas 77007 and to Mr. Paul Bibler, Jr., Assistant County Attorney, 1001 Preston, Suite 637, Houston, Texas 77002.

/s/ CHERYL HELENA CHAPMAN
Cheryl Helena Chapman

4.

Order of the Supreme Court of Texas

CLERK'S OFFICE—SUPREME COURT

Austin, Texas

Oct. 14, 1981

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of C-481, XEROX CORPORATION vs. COUNTY OF HARRIS, TEXAS ET AL. was this day refused. No reversible error.

(Motion to dismiss overruled)

Very truly yours,

GARSON R. JACKSON, Clerk

5.

Denial of Rehearing by the Supreme Court of Texas

CLERK'S OFFICE—SUPREME COURT

Austin, Texas

Nov. 25, 1981

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of XEROX CORPN. v. COUNTY OF HARRIS No. C-481 was this day overruled.

Very truly yours,

GARSON R. JACKSON, Clerk

6.

Notice of Appeal and Acknowledgment of Filing

IN THE SUPREME COURT
OF THE STATE OF TEXAS

No. C-481

XEROX CORPORATION,

Petitioner-Appellant,

—v.—

COUNTY OF HARRIS, TEXAS and
CITY OF HOUSTON, TEXAS,

Respondents-Appellees.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Xerox Corporation, Petitioner-Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Texas finding no reversible error entered on October 14, 1981, and the denial of rehearing on November 25, 1981.

This Appeal is taken pursuant to 28 U.S.C. § 1257(2).

Notice is hereby given that 28 U.S.C. § 2403(b) may be applicable.

/s/ ALFRED H. HODDINOTT, JR.
Alfred H. Hoddinott, Jr., Esquire
800 Long Ridge Road
Stamford, Connecticut 06904
(203) 329-8700

Counsel for Petitioner-Appellant.

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing Notice of Appeal to the Supreme Court of the United States was served on the counsel listed below by mail on this 22nd day of January, 1982 by depositing it in a United States post office with first class postage prepaid to each of those counsel at his post office address.

/s/ ALFRED H. HODDINOTT, JR.
Alfred H. Hoddinott, Jr.

Copies to:

Ms. Cheryl Helena Chapman
Assistant City Attorney
P.O. Box 1562
Houston, Texas 77001

Mr. Larry W. Hays
Assistant County Attorney
1001 Preston, Suite 634
Houston, Texas 77002

Mr. Mark W. White
Attorney General, State of Texas
P.O. Box 12548
Austin, Texas 78711

CLERK'S OFFICE—SUPREME COURT

Austin, Texas

Jan. 29, 1982

Dear Sir:

In the case of *Xerox Corp. v. County of Harris,* C-481, your Notice of Appeal was filed today.

Very truly yours,

GARSON R. JACKSON, Clerk

7.

Amended Notice of Appeal and Acknowledgment of Filing

IN THE
COURT OF CIVIL APPEALS
FIRST SUPREME JUDICIAL DISTRICT
AT HOUSTON, TEXAS

NO. C-481

COUNTY OF HARRIS, TEXAS and
CITY OF HOUSTON, TEXAS,

—VS.—

XEROX CORPORATION

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Xerox Corporation, Petitioner-Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Civil Appeals for the First Supreme Judicial District at Houston, Texas, and from the final judgment of the Supreme Court of the State of Texas finding no reversible error entered on October 14, 1981, and the denial of rehearing on November 25, 1981.

This Appeal is taken pursuant to 28 U.S.C. § 1257(2).

Notice is hereby given that 28 U.S.C. § 2403(b) may be applicable.

/s/ ALFRED H. HODDINOTT, JR.,
Alfred H. Hoddinott, Jr., Esquire
800 Long Ridge Road
Stamford, Connecticut 06904
(203) 329-8700

Counsel for Petitioner-Appellant.

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing Amended Notice of Appeal to the Supreme Court of the United States was served on the counsel listed below, by mail, on this the 1st day of February, 1982, by depositing it in a United States post office with first class postage, prepaid, to each of those counsel at his address.

/s/ ALFRED H. HODDINOTT, JR.
Alfred H. Hoddinott, Jr.

Copies to:

Ms. Cheryl Helena Chapman
Assistant City Attorney
Post Office Box 1562
Houston, Texas 77001

Mr. Larry W. Hays
Assistant County Attorney
1001 Preston
Suite 634
Houston, Texas 77002

Mr. Mark W. White
Attorney General,
STATE OF TEXAS
Post Office Box 12548
Austin, Texas 78711

COURT OF APPEALS

FIRST SUPREME JUDICIAL DISTRICT
Harris County Civil Courts Building
Houston, Texas 77002

February 1, 1982

Lorance & Thompson
Hon. Larry Thompson
303 Jackson Hill at Memorial
Houston, Texas 77007

Dear Sir:

Re: 17862, County of Harris, Texas and City of Houston, Texas vs. Xerox Corporation, from Harris County

Please be advised amended Notice of Appeal to the Supreme Court of the United States, on behalf of Xerox Corporation, was filed today in the above cause.

Respectfully,

MARIBELLE REICH, Clerk

/s/ MARGIE THOMPSON, Deputy

mt

cc: Ms. Cheryl Helena Chapman
P. O. Box 1562
Houston, Texas 77001

Mr. Larry W. Hays
1001 Preston, Suite 634
Houston, Texas 77002

Mr. Mark W. White, Attorney General
P. O. Box 12548
Austin, Texas 78711

8.

Plaintiff's Original Petition

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS

____ Judicial District

NO. _____

XEROX CORPORATION

—VS.—

COUNTY OF HARRIS, TEXAS and
CARL S. SMITH

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW XEROX CORPORATION (hereinafter "Xerox") complaining of the County of Harris, Texas (hereinafter "Harris County") and Carl S. Smith (hereinafter "Smith"), Defendants, and for cause of action would show:

I.

Xerox is incorporated under the laws of New York and is duly authorized to transact business in the State of Texas. Harris County is a duly authorized taxing authority in the State of Texas and may be served, pursuant to Article 2027 V.A.T.S., by serving its County Judge, Jon Lindsay, at his office at 1115 Congress, Houston, Texas, 77002. Smith is the Tax Assessor and Collector of Harris County, is a resident of Harris County, and may be served at his offices at 301 San Jacinto, Houston, Texas 77002.

II.

Xerox is a manufacturer and seller of copier machines, engaging in both domestic and international commerce. Pursuant to its international trade, Xerox stores copiers (Models 3100, 3103 and 660) under United States Customs Bond in the Houston Terminal Warehouse located at 701 North San Jacinto, Houston, Texas, awaiting shipment to Latin American countries.

Xerox manufactures the parts for these copiers at its main manufacturing facility in New York. These parts are shipped to the Mexico affiliate of Xerox, in Mexico City, and are assembled into the final product. After manufacturing, the copiers are separately packaged and shipped to Nuevo Laredo, Mexico, and, at this point, are placed in Customs Bond. The copiers are then shipped, by truck, in Customs Bond, to the Houston Terminal Warehouse where they remain in Customs Bond and under continuous Customs control and supervision until shipped to Latin America, pursuant to orders placed with Xerox by its various Latin American affiliates. From the time these copiers enter the United States until they leave the United States, either through the Houston International Trade facilities or via Miami, Florida, the copiers are under the strict, constant control and regulation of the United States Customs Service.

In the three year period in which Xerox has used the Houston Terminal Warehouse facilities, over ten thousand copiers passed through said warehouse; none of them have entered the commerce of the United States, and virtually all have entered Latin American countries. Houston Terminal Warehouse stores Xerox copiers that are destined exclusively for foreign trade.

III.

By statute, Harris County may impose and Smith may assess and collect ad valorem taxes on personal property which is within the boundaries of Harris County and which is subject to such taxes. Ad valorem taxes were imposed by Harris County

for the year 1977 at the rate of $1.25 per $100.00 of assessed valuation on certain personal property within the county, upon an assessed valuation of property equal to 32% of the actual valuation. Ad valorem taxes for the year 1977, are due on October 1, 1977, and as of February 1, 1978, taxes become delinquent if not paid. If taxes are not paid by February 1, 1978, Harris County and Smith may enforce collection thereof.

IV.

On January 1, 1977, Xerox was the owner of the aforementioned copiers at the Houston Terminal Warehouse. Within the time and in the manner prescribed by law, Xerox filed an application requesting an exemption with respect to these copiers. At all times material hereto, Xerox had a warehouse in Houston for storage of copiers it owns, leases, and maintains for domestic use in the Harris County area; Xerox does not now, and never has, claimed an exemption for these domestic-use copiers.

Subsequent to filing the request for an exemption, Xerox received notice from Smith advising Xerox that its request for an exemption with respect to the copiers at Houston Terminal warehouse was denied, and that the copiers at said warehouse on January 1, 1977, were placed on the tax rolls of Harris County at a value of Nine Million Fifteen Thousand Six Hundred Eighty-Five Dollars ($9,015,685.00), with taxes assessed at approximately Fifty-Six Thousand Dollars ($56,000.00).

V.

Article 1, Section 8, Clause 3, of the United States Constitution provides:

> "The Congress shall have the power . . . to regulate commerce with foreign nations, and among the several states and with the Indian Tribes."

Pursuant to the Commerce Clause, Congress has promulgated statutes (19 USC § 1551 et seq.) and, pursuant to these

statutes, the Secretary of Transportation has promulgated regulations (19 C.F.R. § 19.1 et seq.) which frees goods stored in Customs bonded warehouses of any import duties, and if such goods are exported and not used for domestic consumption, no duty on the importation can be levied. The purpose and effect of the statutes and regulations is to free American enterprises from extra financial burdens so that these enterprises can effectively compete in foreign commerce. The federal purpose, through its statutes and regulations, of granting American businesses this competitive advantage in their international commerce and trade, pre-empts any attempt by local governments to place taxes on the merchandise of such businesses. To allow local taxes, e.g., ad valorem taxes on merchandise having a foreign destination, would effectively abrogate the federal plan and purpose of granting this competitive advantage. Thus, the local tax must yield, under the supremacy clause of the federal constitution, to the dictates of the federal statutes and regulations.

VI.

Article 1, Section 10, Clause 2, of the United States Constitution provides:

> "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of congress."

Congress has not consented to the imposition of ad valorem taxes on goods in a Customs Bonded warehouse, and the Harris County ad valorem taxes are not necessary for the execution of any inspection laws of Texas or any political sub-division thereof, including Harris County.

The Xerox copiers are protected by the import-export clause as the only time the copiers are ever "at rest" and not

physically being transported, while in Texas, is when the copiers are under customs bond in the Houston Terminal Warehouse. As indicated, goods in a Customs bonded warehouse are exempt from local taxation. In addition, federal statutes allow goods in a Customs bonded warehouse to remain for a period of three years (with routine extensions of at least one year) before any duty can be imposed on such goods. Effectively, this is a congressional determination that the goods have not entered the domestic marketplace and are still "in transit." Thus, the Xerox copiers are continually in import-export transit and are constitutionally exempt from local taxation.

VII.

Xerox has consistently claimed the exemptions for its copiers from the ad valorem taxes, based on the decisions, statutes and regulations pursuant to the Commerce Clause and based on the Import-Export Clause; and has at all times made same known to Harris County and Smith.

VIII.

Harris County, Smith and the Harris County Board of Equalization have each and all refused and denied Xerox's claim of a tax exemption for the copiers located at the Houston Terminal Warehouse. Smith has assessed such tax and the Board of Equalization has affirmed Smith's decision.

Defendants are insisting that Xerox pay the tax and are threatening to assess and collect and to continue to assess and collect such illegal and unconstitutional taxes.

IX.

There exists an actual, substantial, immediate and bone fide controversy between Xerox and Defendants as to the legality and constitutionality of the imposition of the Harris County ad valorem taxes on Xerox's copiers located at the Houston Terminal Warehouse, and Xerox seeks herein and is entitled to have a declaration that said tax is improper, illegal and unconstitutional and may not be imposed or collected.

X.

As of February 1, 1978, Xerox will have no adequate remedy at law and will be irreparably damaged, unless Defendants are enjoined from collecting said tax. Article 7266, V.A.T.S., allows the Tax Assessor-Collector to summarily seize and sell, without Court process, any and all personal property of Xerox located in Harris County and apply same to reduce the amount of the illegal tax assessed against Xerox. Accordingly, prior to February 1, 1978, upon hearing hereof, Defendants should be temporarily enjoined from the enforcement or collection of said illegal tax, and from seizure of, levy upon, or sale of any of Xerox's property, and from any other means of enforcement or attempted enforcement by said Defendants of the illegal tax on Xerox's copiers. Upon final hearing, said injunction should be made permanent.

WHEREFORE, PREMISES CONSIDERED, Xerox prays that Defendants be cited to appear and answer herein, and that

(1) Pursuant to Article 2524-1, V.A.T.S., this court declare and adjudge that the Harris County ad valorem tax on Xerox's copiers located at the Houston Terminal Warehouse is unconstitutional, illegal and void;

(2) Prior to February 1, 1978, Defendants be temporarily enjoined from any collection, enforcement or attempted enforcement of the unlawful tax on Xerox's copiers, in question pending a final determination hereof;

(3) Defendants be permanently enjoined from assessing, collecting and enforcing said unconstitutional, illegal and void tax against Xerox or any of its property, whether real, personal, mixed, intangible or tangible;

(4) And for general relief, both legal and equitable, to which Xerox is justly entitled.

Respectfully submitted,

LORANCE, THOMPSON & WITTIG

BY /s/ LARRY D. THOMPSON
Larry D. Thompson
Attorney for Plaintiff
609 Fannin, Suite 2121
Houston, Texas 77002
222-1304

Joint Appendix

Office - Supreme Court, U.S.
FILED
APR 28 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1489

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

XEROX CORPORATION,

Appellant,

—v.—

COUNTY OF HARRIS, TEXAS, and
CITY OF HOUSTON, TEXAS,

Appellees.

APPEAL FROM THE TEXAS COURT OF CIVIL APPEALS

JOINT APPENDIX

ALFRED H. HODDINOTT, JR.
800 Long Ridge Road
Stamford, Connecticut 06904
(203) 329-8700
Counsel for Appellant

MICHAEL H. DRISCOLL
County Attorney
EDWARD J. LANDRY
JOHN J. GREENE
Assistant County Attorneys
1001 Preston, Suite 634
Houston, Texas 77002
(713) 221-5101
Counsel for Appellee
County of Harris, Texas

(Attorneys names continued on inside cover)

APPEAL DOCKETED FEBRUARY 9, 1982
PROBABLE JURISDICTION NOTED APRIL 5, 1982

F. J. COLEMAN, JR.
City Attorney

JAY D. HOWELL, JR.
Senior Assistant City Attorney

CHERYL HELENA CHAPMAN
Senior Assistant City Attorney
Counsel of Record

BELINDA TURNER SAULSBERRY
Assistant City Attorney
P.O. Box 1562
Houston, Texas 77251
(713) 222-5151

Counsel for Appellee
City of Houston

TABLE OF CONTENTS

	PAGE
Relevant Docket Entries	1a
Original Answer and Counter Claim of Defendant City of Houston—Filed February 3, 1978, District Court, Harris County, Texas	4a
Counter-Defendant's Original Answer—Filed February 17, 1978, District Court, Harris County, Texas	7a
Plaintiff's Supplemental Petition—Filed January 29, 1979, District Court, Harris County, Texas	8a
Plaintiff's Request for Admissions of Facts—Filed July 17, 1979, District Court, Harris County, Texas	10a
Defendant City of Houston's Response to Request for Admissions of Facts—Filed July 27, 1979, District Court, Harris County, Texas	14a
Defendant City of Houston's Request for Admissions—Filed August 23, 1979, District Court, Harris County, Texas	16a
Interrogatories Propounded by Defendant City of Houston—Filed August 23, 1979, District Court, Harris County, Texas	18a
Plaintiff's Answer to Request for Admissions—Filed September 14, 1979, District Court, Harris County, Texas	22a
Defendant County of Harris' Response to Request for Admissions of Facts—Filed September 28, 1979, District Court, Harris County, Texas	23a
Plaintiff's Answers to Interrogatories—Filed December 6, 1979, District Court, Harris County, Texas	27a
Defendant City of Houston's Request for Admission—Filed March 19, 1980, District Court, Harris County, Texas	34a

PAGE

Defendant County of Harris' First Amended Answer and Counterclaim—Filed March 26, 1980, District Court, Harris County, Texas..... 35a

Plaintiff's Answer to Defendant's Counterclaim—Filed April 22, 1980, District Court, Harris County, Texas. 38a

Plaintiff's Answer to Request for Admission—Filed May 2, 1980, District Court, Harris County, Texas .. 39a

Plaintiff's Amended Answers to Interrogatories—Filed May 8, 1980, District Court, Harris County, Texas .. 40a

Revised Judgment—Entered September 9, 1980, District Court, Harris County, Texas..... 44a

Order Directing Inclusion of Original Exhibits in the Statement of Facts and Forwarding of Deposition—Filed October 22, 1980, District Court, Harris County, Texas..... 46a

Appendix to Brief of County of Harris—Filed December 9, 1980, Texas Court of Civil Appeals 49a

Judgment of Texas Court of Civil Appeals—Filed December 3, 1981 ..... 108a

NOTE: The following materials have been reprinted in previous submissions to the Court, and are therefore not included in this Appendix:

A. Plaintiff's Original Petition. Filed September 30, 1977, District Court, Harris County, Texas. [Reprinted in Jurisdictional Statement Appendix at 28a-34a]

B. Plaintiff's First Amended Original Petition. Filed January 13, 1978, District Court, Harris County, Texas. [Reprinted in Appendix A, Motion to Dismiss or Affirm of Appellee City of Houston at A-1-A-8]

C. Opinion of Lynn N. Hughes, Judge. Filed July 14, 1980, District Court, Harris County, Texas. [Reprinted in Jurisdictional Statement Appendix at 11a-14a]

D. Amended Findings of Fact and Conclusions of Law. Filed October 24, 1980, District Court, Harris County, Texas. [Reprinted in Jurisdictional Statement Appendix at 15a-19a]

E. Opinion of Texas Court of Civil Appeals. Filed April 30, 1981. [Reprinted in Jurisdictional Statement Appendix at 1a-10a]

F. Order of Supreme Court of Texas Refusing Application for Writ of Error. Filed October 14, 1981. [Reprinted in Jurisdictional Statement Appendix at 20a]

G. Order of Supreme Court of Texas Overruling Motion for Rehearing. Filed November 25, 1981. [Reprinted in Jurisdictional Statement Appendix 21a]

H. Notice of Appeal to the United States Supreme Court, and Acknowledgment of Filing. Filed January 29, 1981, Supreme Court of Texas. [Reprinted in Jurisdictional Statement Appendix at 22a-24a]

I. Amended Notice of Appeal to the United States Supreme Court and Acknowledgment of Filing. Filed February 1, 1982, Texas Court of Civil Appeals. [Reprinted in Jurisdictional Statement Appendix at 25a-27a]

Relevant Docket Entries

I. DISTRICT COURT FOR THE 165TH DISTRICT, HOUSTON, TEXAS

1. September 30, 1977	—	Plaintiff's Original Petition filed.
2. January 13, 1978	—	Plaintiff's First Amended Original Petition filed.
3. February 3, 1978	—	Original Answer & Counterclaim of Defendant City of Houston filed.
4. February 17, 1978	—	Counter-Defendant's Original Answer filed.
5. January 29, 1979	—	Plaintiff's Supplemental Petition filed.
6. July 17, 1979	—	Plaintiff's Request for Admissions of Facts filed.
7. July 27, 1979	—	Defendant City of Houston's Response to Request for Admissions of Facts filed.
8. August 23, 1979	—	Defendant City of Houston's Request for Admissions filed.
9. August 23, 1979	—	Defendant City of Houston's Interrogatories filed.
10. September 14, 1979	—	Plaintiff's Response to Request for Admissions filed.
11. September 28, 1979	—	Defendant County of Harris' Response to Request for Admissions filed.
12. December 6, 1979	—	Plaintiff's Answers to Interrogatories filed.
13. March 19, 1980	—	Defendant City of Houston's Request for Admission filed.

14. March 26, 1980 — Defendant County of Harris' First Amended Answer & Counterclaim filed.
15. April 22, 1980 — Plaintiff's Answer to Defendant's Counterclaim filed.
16. May 2, 1980 — Plaintiff's Answer to Request for Admission filed.
17. May 8, 1980 — Plaintiff's Amended Answers to Interrogatories filed.
18. July 7, 1980 — Trial commenced and concluded.
19. July 14, 1980 — Opinion of Lynn N. Hughes, Judge, 165th District Court, filed.
20. September 9, 1980 — Revised Judgment filed.
21. September 11, 1980 — Notice of Appeal filed.
22. October 22, 1980 — Order Directing Inclusion of Original Exhibits in the Statement of Facts and Forwarding of Depositions filed.

II. COURT OF CIVIL APPEALS OF TEXAS, HOUSTON (1ST DISTRICT)

1. April 30, 1981 — Opinion and Order filed.
2. May 21, 1981 — Petition for Rehearing denied.

III. SUPREME COURT OF TEXAS

1. June 18, 1981 — Application for Writ of Error filed.
2. July 6, 1981 — Motion to Dismiss of Defendant County of Harris filed.
3. July 15, 1981 — Answer of Defendant City of Houston to Application for Writ of Error filed.

4. October 14, 1981 — Application for Writ of Error refused.

5. November 25, 1981 — Motion for Rehearing overruled.

IV. COURT OF CIVIL APPEALS OF TEXAS, HOUSTON (1ST DISTRICT)

1. December 3, 1981 — Judgment entered.

2. February 1, 1982 — Notice of Appeal to United States Supreme Court filed.

Original Answer and Counter Claim of Defendant City of Houston—Filed February 3, 1978, District Court, Harris County, Texas.

[Title omitted in printing]

DEFENDANTS' ORIGINAL ANSWER AND COUNTERCLAIM OF THE CITY OF HOUSTON

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME the CITY OF HOUSTON and the HOUSTON INDEPENDENT SCHOOL DISTRICT, Defendants in the above numbered and entitled cause, and file this their answer and counterclaim answering the Plaintiff's First Amended Original Petition and all subsequent amendments thereto and also presenting a counterclaim, and in connection therewith, would respectfully show this Honorable Court as follows:

I. GENERAL DENIAL

The Defendants deny each and every, all and singular, the allegations contained in the Plaintiff's Petition, and demand strict proof thereof.

II. COUNTERCLAIM

The CITY OF HOUSTON, a municipal corporation, principally situated in Harris County, Texas, a Defendant and Counter-Plaintiff herein brings this its Counterclaim for delinquent ad valorem taxes in behalf of itself and for the use and benefit of the HOUSTON INDEPENDENT SCHOOL DISTRICT, also a municipal corporation situated in Harris County, Texas, whose taxes are collected by the Assessor and collector of Taxes for the CITY OF HOUSTON against XEROX CORPORATION, herein referred to as Counter-Defendant.

1. XEROX CORPORATION, the Counter-Defendant, a New York corporation, licensed to do business in the State of Texas, may be served by delivering citation to its Registered Agent, C. T. Corp., Republic National Bank Building, Dallas, Texas.

2. Counter-Defendant owns or owned or claims or claimed some interest in personal property situated in the City of Houston and the Houston Independent School District, and described as follows, to-wit:

MERCHANDISE STORED AT HOUSTON
TERMINAL WAREHOUSE AND
COLD STORAGE CO.
Located at 701 N. San Jacinto, Houston,
Harris County, Texas

3. That as to such above described personal property there are delinquent taxes justly due, owing and unpaid for the following year and in the following amount, to-wit:

Years Delinquent	*To Whom Assessed*	*Amounts*
1977	Xerox Corp.	$156,728.90

together with penalties, interest, costs and attorney's fees provided by law or legally accruing thereon in the amount of $172,859.45 as more particularly set out in the attached exhibit page, which exhibit is made a part hereof as fully as if set out word for word herein; and that the penalties, interest and attorney's fees are provided by law and increase monthly as provided by law.

4. That all said taxes were authorized by law and each political subdivision on whose behalf this suit is brought was legally constituted and authorized to assess and collect the same, and all of said taxes were duly and legally levied and assessed against the above described personal property and the owners thereof, and all things required by law to be done have been duly and legally performed by the proper officials, and all conditions precedent have been performed or have occurred.

5. That all of the above described personal property was, at the time that the said taxes were assessed, situated for tax purposes within the City of Houston and the Houston Independent School District.

6. That the above described personal property has a value of more than Five Hundred Dollars ($500.00).

7. That the attorney whose name is signed hereto is legally authorized and empowered to institute and prosecute this action on behalf of each political subdivision or municipal corporation named in paragraph (5) above.

8. That this counterclaim is also brought for such taxes (together with penalties, interest, costs and attorney's fees) as may become delinquent against said property, owing to each subdivision or corporation aforementioned for the year 1978 and for any other years which may become delinquent before judgment is entered herein; such taxes become delinquent on the first day of January of the year following the year in which and for which they were levied and assessed.

WHEREFORE, PREMISES CONSIDERED, the Defendants respectfully pray that the Plaintiff, XEROX CORPORATION, take nothing by its suit, that the Defendants be awarded costs of litigation, that Plaintiff's cause in all things be dismissed, and FURTHERMORE, the CITY OF HOUSTON also prays judgment against XEROX CORPORATION for the amount of said taxes, together with all penalties, interest, costs, attorney's fees, and other charges or expenses that may be or become legally due and owing, together with foreclosure of the tax liens against the above described property, and for personal judgment against said XEROX CORPORATION owning said property at the time same was assessed for taxation for the amount shown to be due on it, and for general relief.

Respectfully submitted,

ROBERT M. COLLIE, JR.
City Attorney

/s/ CHERYL HELENA CHAPMAN
Assistant City Attorney
P. O. Box 1562
Houston, Texas 77001
222-5151

Counter-Defendant's Original Answer—Filed February 17, 1978, District Court, Harris County, Texas.

[Title omitted in printing]

COUNTER-DEFENDANT'S ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW XEROX CORPORATION, Plaintiff in the above numbered and entitled cause and Counter-Defendant herein, and files this its Answer to the Counterclaim of Counter-Plaintiff, CITY OF HOUSTON, and in connection therewith would show the Court as follows:

I.

Counter-Defendants, pursuant to Rule 92, Texas Rules of Civil Procedure, deny each and every, all and singular, the allegations contained in the Original Answer and Counterclaim of the Defendant, CITY OF HOUSTON, and demand strict proof thereof.

II.

Affirmatively pleading, Counter-Defendant would show that the taxes, penalties, and attorney's fees sought to be imposed are illegal in that they violate the United States Constitution, United States Statutes and Agency Regulations pursuant thereto, as more fully set out in Plaintiff's First Amended Original Petition heretofore filed with this Court, which is hereby incorporated herein by reference for all purposes.

WHEREFORE, PREMISES CONSIDERED, Counter-Defendant, XEROX CORPORATION, prays that Counter-Plaintiffs take nothing by their Counterclaim, that Counter-Defendants be awarded costs of litigation, and for such other relief, both in law and in equity, to which Counter-Defendant may be entitled.

Respectfully submitted,

[Signature of counsel and certificate of service omitted in printing]

Plaintiff's Supplemental Petition—Filed January 29, 1979, District Court, Harris County, Texas.

[Title omitted in printing]

PLAINTIFF'S SUPPLEMENTAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW XEROX CORPORATION, Plaintiff in the above referenced matter, and files this its Supplemental Petition to Plaintiff's First Amended Original Petition which has been heretofore filed with this Court, and for same would show the Court the following:

I.

Subsequent to the filing of Plaintiff's First Amended Original Petition, the Plaintiff, XEROX CORPORATION, received a tax statement from the State of Texas, County of Harris, assessing taxes on inventory stored at the Houston Terminal Warehouse, 701 North San Jacinto, for the year 1976. This inventory is of the same nature and stored for the same purposes as that inventory referenced in the Plaintiff's First Amended Original Petition.

II.

The COUNTY OF HARRIS is now presenting a claim to XEROX CORPORATION assessing a tax on said inventory—copiers in the amount of $48,428.06.

III.

Your Plaintiff would show that said tax and any penalty and attorney's fees attendant thereto are illegal, void and unconstitutional in that they violate the United States Constitution, United States Statutes and Agency Regulations pursuant thereto. Plaintiff adopts by reference and for all purposes the Paragraphs numbered V and VI of Plaintiff's First Amended Original Petition in support of its position.

IV.

Further pleading, your Plaintiff would show that it filed an Affidavit or Certificate rendering the value of said inventory as it existed in the Houston Terminal Warehouse as of January 1, 1976. Said Certificate sought an exemption from the advalorem taxes based on the commerce clause and the import-export clause of the United States Constitution, and the appropriate Federal Statutes and Agency Regulations.

The COUNTY OF HARRIS, through its Deputy Tax Assessor, H. F. Bruce, granted the exemption from taxes since the goods were stored "in bond on January 1, 1976." A copy of the Certificate requesting the exemption and the Exemption granted by the County are attached hereto and incorporated herein by reference for all purposes.

By virtue of said exemption granted by the County, the County is estopped to seek to impose and collect any taxes on said inventory for the year 1976.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays for relief as requested in its First Amended Original Petition; that this Court declare that the advalorem taxes sought to be imposed by the County are unconstitutional, illegal and void; that Defendant be permanently enjoined from assessing, collecting and enforcing said unconstitutional, illegal and void taxes; and for general relief, both legal and equitable, to which XEROX CORPORATION is justly entitled.

Respectfully submitted,

[Signature of counsel and certificate of service omitted in printing]

**Plaintiff's Request for Admissions of Facts—
Filed July 17, 1979,
District Court, Harris County, Texas.**

[Title omitted in printing]

REQUEST FOR ADMISSIONS OF FACTS

TO: CITY OF HOUSTON, by and through its attorney of record, Ms. Cheryl Helena Chapman, Assistant City Attorney, P. O. Box 1562, Houston, Texas, 77001.

COMES NOW XEROX CORPORATION, Plaintiff in the above captioned cause and pursuant to Rule 169, Texas Rules of Civil Procedure, hereby requests and demands of you to make admissions of the following statements of fact which are materially pertinent to pleadings and answer hereto in accordance with Rule 169, Texas Rules of Civil Procedure, under which rule of procedure this Request for Admissions is made, thereby answering the following facts in the above entitled and numbered cause, and that such answers be sworn to and filed promptly in the office of the Harris County District Clerk where this cause is pending and a copy delivered to the writer within ten (10) days from the serving of this request upon you; otherwise, each of the matters of which an admission is requested and demanded shall be deemed admitted by you in accordance with Rule 169, Texas Rules of Civil Procedure.

[Signature of counsel and certificate of service
omitted in printing]

ADMIT OR DENY THAT:

1. Xerox Corporation (Xerox) is a corporation incorporated under the laws of the State of New York.

2. Xerox is duly authorized to transact business in the State of Texas.

3. The County of Harris, Texas, is a duly authorized taxing authority in the State of Texas and is authorized by statute to collect taxes in its own behalf and on behalf of the State of Texas.

4. The City of Houston and Houston Independent School District (H.I.S.D.) are duly authorized taxing authorities in the State of Texas. The City of Houston is authorized by law to collect taxes on its own behalf and on behalf of the Houston Independent School District.

5. Xerox is a manufacturer, a seller, and lessor of copier machines in both domestic and international commerce.

6. Pursuant to its domestic business, Xerox maintained separate facilities for storage in Harris County, Texas, for its copiers and accessories that it owns, sells, leases and maintains for local use in the Harris County area. These copiers and their taxes are not in dispute in this action.

7. The copiers in question in this litigation were not a part of Xerox's inventory used for the local leasing and selling of copiers in and around Harris County.

8. The copiers in question in this litigation were destined for eventual use in the Caribbean and Latin America.

9. The copiers in question in this litigation were those copiers stored in the Houston Terminal Warehouse, 701 North San Jacinto, Houston, Harris County, Texas.

10. The copiers in question in this litigation were all stored under customs bond in the Houston Terminal Warehouse.

11. Houston Terminal Warehouse was at all times relevant to this litigation a Customs bonded warehouse.

12. Houston Terminal Warehouse is a class III Customs bonded warehouse, bonded pursuant to rules and regulations promulgated by the Secretary of the Treasury, Title 19 of the Code of Federal Regulations, Section 19.01 et seq.

13. A bond was given by Xerox for the purpose of enabling Xerox, under statutes of the United States and Treasury regula-

tions, to bring the copiers into the United States and then to withdraw them for export or other lawful purpose free of the import duty which would otherwise be payable. The bonds were conditioned, among other things, upon compliance with the laws and regulations relating to the custody and safe keeping of the imported merchandise and to which lawful withdrawal from the warehouse under permit of the customs service within the time permitted by law.

14. At Houston Terminal Warehouse, the copiers remained in Customs bond under the control and supervision of the United States Customs Service.

15. From the time the copiers entered the United States until they left the United States, the copiers were under the supervision and control of the United States Customs Service, and were under Customs bond.

16. If these copiers were imported to the United States, Xerox would have to pay U.S. Customs duties amounting to 6% of the value of the copiers (about $540,000.00 based on the value of the copiers in Houston Terminal Warehouse as of January 1, 1977) plus 6% of the value of the technical assists.

17. The fair market value of said copiers located in the Houston Terminal Warehouse on January 1, 1977 was $9,015,690.00.

18. The Defendant-taxing authority for the year 1977, had the following ad valorem tax schedules in effect:

(1) City of Houston—$1.58 per one hundred dollar valuation upon an assessed valuation equal to 53% of actual valuation;

(2) H.I.S.D.—$1.70 per one hundred dollar valuation upon an assessed valuation equal to 53% of actual valuation.

19. Based upon these tax schedules, the copiers located at the Houston Terminal Warehouse on January 1, 1977, had taxes assessed as follows:

(1) City of Houston—$75,497.46;

(2) H.I.S.D.—$81,231.44.

20. The valuation of the copiers, the computation of the taxes and the amount of the taxes assessed are not in dispute.

21. Xerox has claimed and continues to claim that said copiers located in the Houston Terminal Warehouse are exempt from state and local taxation.

22. At all material times, Xerox filed a request seeking an exemption of said copiers from state and county taxes.

23. The regulations promulgated by the Secretary of Transportation concerning Customs bonded warehouses are contained in Title 19, Code of Federal Regulations, Sections 19.1 through 19.12.

24. The pages attached hereto are true and correct copies of pages 5 through 8 of the 1978 Annual Budget of Houston.

[Exhibit omitted in printing]

Defendant City of Houston's Response to Request for Admissions of Facts—Filed July 27, 1979, District Court, Harris County, Texas.

[Title and signature of counsel omitted in printing]

1. Admits

2. Admits

3. Admits

4. Admits

5. Admits

6. Admits

7. Defendant can neither truthfully admit nor deny such matter because it is not in possession of sufficient facts and information and has not presently obtained such facts as would enable it to admit or deny the matter.

8. Defendant can neither truthfully admit nor deny such matter because it is not in possession of sufficient facts and information and has not presently obtained such facts as would enable it to admit or deny the matter.

9. Admits

10. Admits

11. Admits

12. Admits

13. Admits

14. Admits

15. Admits

16. Defendant can neither truthfully admit nor deny such matter because it is not in possession of sufficient facts and information and has not presently obtained such facts as

would enable it to admit or deny the matter. Additionally, the request calls for an opinion or conclusion of law.

17. Admits

18. Admits

19. Admits

20. Admits

21. Admits as to the City of Houston and Houston Independent School District only.

22. Defendant can neither admit nor deny the truth of the matter because it is not in possession of sufficient facts and because it calls for a response to a matter in which it has no interest.

23. Admits

24. Admits

[Signature of counsel, certificate of service and exhibits omitted in printing]

Defendant City of Houston's Request for Admissions—Filed August 23, 1979, District Court, Harris County, Texas.

[Title omitted in printing]

REQUEST FOR ADMISSIONS

TO: Xerox Corporation, Plaintiff
c/o Larry D. Thompson
Lorance, Thompson & Wittig
Attorney for Plaintiffs
303 Jackson Hill at Memorial Drive
Suite 300
Houston, Texas 77007

PURSUANT TO THE PROVISIONS of Rule 169 of the Texas Rules of Civil Procedure, you are hereby requested to admit the truth of the facts stated below within ten days after delivery of this request to Mr. Larry D. Thompson, your Attorney of Record. You are advised that, as provided in Rule 169, each of the matters stated below, of which admission is requested, will be deemed admitted unless a sworn statement is delivered to Cheryl Helena Chapman, Assistant City Attorney, City of Houston, P. O. Box 1562, Houston, Texas 77001, on or before the date above specified, or within such further time as the court may allow on motion and notice, either denying specifically the matters of which admission is requested herein, or setting forth in detail the reasons why said matters cannot truthfully be either admitted or denied.

Respectfully submitted,

[Signature of counsel and certificate of service omitted in printing]

PLEASE ADMIT OR DENY THAT:

1. Houston Terminal Warehouse and Cold Storage Company (hereafter referred to as the "Warehouse") has storage

facilities at 701 San Jacinto at which the copiers in question were stored on January 1, 1977.

2. The Warehouse is a privately owned public warehouse. It is not a federal enclave or a Free Trade Zone.

3. At the 701 San Jacinto location, the Warehouse stores both customs bonded property and non-customs bonded property. The difference between the two kinds of storage is that the property stored under customs bond is physically segregated from the other stored property and is maintained under the supervision of the U.S. Customs Service.

4. On January 1, 1977 Xerox owned 4,248 copiers which were stored at the Warehouse under customs bond.

5. Copiers arrived at the Warehouse at various times during the years 1976 and 1977.

6. The number of copiers assessed on January 1, 1977 is fairly representative of the number of copiers stored at the Warehouse daily during the years 1976 and 1977.

7. Xerox began storing copiers at the Warehouse in the manner described in its petition beginning in 1974.

8. The copiers in question were not consigned to a common carrier on January 1, 1977.

9. The copiers are stored at the Warehouse for various periods awaiting distribution and sale to Latin American affiliates or customers.

10. Had the facts of this case been the same except that the copiers were not stored under import customs bond the copiers would be subject to State and local ad valorem taxes.

11. The tax imposed by the City of Houston and Houston Independent School District is a non-discriminatory ad valorem tax.

Interrogatories Propounded by Defendant City of Houston—Filed August 23, 1979, District Court, Harris County, Texas.

[Title omitted in printing]

INTERROGATORIES PROPOUNDED BY DEFENDANT, CITY OF HOUSTON

TO: Xerox Corporation, Plaintiff
c/o Larry D. Thompson
Lorance, Thompson & Wittig
Attorney for Plaintiff
303 Jackson Hill at Memorial Drive
Suite 300
Houston, Texas 77007

PURSUANT TO RULE 168 of the Texas Rules of Civil Procedure, the following Interrogatories are submitted to be answered by any of your officers or agents who are able to, and shall, furnish all such information called for by said interrogatories, as is available to you. The said answers shall be signed, and sworn to, by each such officer or agent answering the same, with respect to such answers as he or she shall make, and shall be served upon the undersigned within thirty days from the date of service of these interrogatories on your attorney of record.

The term "foreign copiers" refers to the Xerox copiers which were destined for Latin American and Caribbean countries.

The term "Warehouse" refers to the Houston Terminal Warehouse and Cold Storage Company.

1. What is the principal place of business in Texas of Xerox Corporation.

2. Plaintiff alleges in its petition that the component parts of the copiers were manufactured in Rochester, New York, assembled in Mexico, and stored in Houston while awaiting ultimate delivery to various Latin American countries. Please

describe in detail the journey of these foreign destined copiers from the time of manufacture to their delivery and sale. Please also describe the process of manufacture, assembly, distribution and sale, and include in your answer information regarding the following factors:

a. The difference, if any, between the manufacture and assembly of foreign and domestic copiers.

b. The reasons for utilizing the Mexican corporate affiliate for assembly of the component parts.

c. The reasons for returning the copiers to the United States and for their storage in Houston and in other domestic cities.

d. The events which lead to their ultimate export to Latin American countries.

3. a. When copiers first arrive in Houston, have identifiable copiers customarily been committed to or sold to Latin American customers?

b. If yes, please indicate what percentage of copiers are previously committed.

4. a. Please describe the difference between the design, feature and structure of a domestic copier and a foreign copier.

b. Are the component parts of the foreign copiers different from those of domestic copiers? If so, please explain.

c. Can copiers manufactured for domestic commerce be converted for sale to Latin American customers, and *vice versa*. If so, what is the cost of such conversion.

d. Please attach diagrams of a foreign copier of a model stored in the Warehouse and a comparable model domestic copier which would illustrate the difference between their design, feature and structure, if you will do so without a motion and order to produce.

5. In the accompanying Request for Admissions, the City of Houston has requested the admission to the following fact:

"The number of copiers assessed on January 1, 1977 is fairly representative of the number of copiers stored at the Warehouse daily during the years 1976 and 1977." If the Plaintiff does not admit this fact, please summarize by month the number of copiers stored at the Warehouse between January 1, 1976 and December 31, 1977.

6. a. What is the median length of time that copiers were stored at the Warehouse between January 1, 1976 and the time that Plaintiff discontinued use of the storage facilities in 1977.

b. Since initial use of the storage facilities in 1974, what is the longest period copiers have been stored in the Warehouse.

c. What is the shortest period of time.

d. When did Plaintiff discontinue using the Warehouse for storage of its foreign designated copiers?

7. a. With respect to Plaintiff's allegation that the copiers were imported from Mexico for ultimate exportation to various Latin American countries, please attach copies of customs documentation if you will do so without a motion and order to produce. If you will not do so without a motion and order to produce, please give the name of Plaintiff's agent who has knowledge of, or custody and control over the requested information.

b. Did any of the copiers remain in the U.S. If so, please explain.

c. Were any copiers exported to other than Latin American or Caribbean countries. If so, please explain.

8. Please list the names (not exceeding 5) of the Xerox's Latin American competitors whose copiers are manufactured and assembled in the United States.

9. a. Of the copiers stored in the Warehouse on January 1, 1979, had any identifiable copiers been committed to sale prior to January 1? If so, how many.

b. Please briefly describe in general the terms of such sale arrangements.

[Signature of counsel and certificate of service omitted in printing]

**Plaintiff's Answer to Request for Admissions—
Filed September 14, 1979,
District Court, Harris County, Texas.**

[Title omitted in printing]

ANSWER TO REQUEST FOR ADMISSIONS

COMES NOW the Plaintiff, XEROX CORPORATION, and for answer to Request for Admissions would say as follows:

1. Admitted
2. Admit the first sentence, deny the second sentence.
3. Admitted
4. Admitted
5. Admitted
6. Admitted
7. Admitted
8. Admitted
9. Admitted
10. Denied
11. Admitted

Respectfully submitted,

[Signature of counsel and certificate of service
omitted in printing]

Defendant County of Harris' Response to Request for Admissions of Fact—Filed September 28, 1979, District Court, Harris County, Texas

[Title Omitted in Printing]

RESPONSE TO REQUEST FOR ADMISSIONS OF FACTS

To: Lorance, Thompson & Wittig,
Attorneys for Plaintiff Xerox Corporation,
303 Jackson Hill at Memorial, Suite 300,
Houston, Texas 77007.

In accordance with Rule 169, Texas Rules of Civil Procedure, Defendant Harris County makes the following response to the Request for Admissions of Facts propounded by Plaintiff Xerox Corporation on or about July 16, 1979:

1. Admitted

2. Admitted

3. Admitted

4. Admitted

5. Admitted

6. Defendant can neither truthfully admit nor deny such matter because it is not in possession of sufficient facts and information and has not presently obtained such facts as would enable it to admit or deny the matter.

7. Defendant can neither truthfully admit nor deny such matter because it is not in possession of sufficient facts and information and has not presently obtained such facts as would enable it to admit or deny the matter.

8. Defendant can neither truthfully admit nor deny such matter because it is not in possession of sufficient facts and information and has not presently obtained such facts as would enable it to admit or deny the matter.

9. Admitted

10. Defendant can neither truthfully admit nor deny such matter because it is not in possession of sufficient facts and information and has not presently obtained such facts as would enable it to admit or deny the matter.

11. Defendant can neither truthfully admit nor deny such matter because it is not in possession of sufficient facts and information and has not presently obtained such facts as would enable it to admit or deny the matter.

12. Defendant can neither truthfully admit nor deny such matter because it is not in possession of sufficient facts and information and has not presently obtained such facts as would enable it to admit or deny the matter.

13. Defendant can neither truthfully admit nor deny such matter because it is not in possession of sufficient facts and information and has not presently obtained such facts as would enable it to admit or deny the matter.

14. Defendant can neither truthfully admit nor deny such matter because it is not in possession of sufficient facts and information and has not presently obtained such facts as would enable it to admit or deny the matter.

15. Defendant can neither truthfully admit nor deny such matter because it is not in possession of sufficient facts and information and has not presently obtained such facts as would enable it to admit or deny the matter.

16. Defendant can neither truthfully admit nor deny such matter because it is not in possession of sufficient facts and information and has not presently obtained such facts as would enable it to admit or deny the matter.

17. Denied, the correct figure is $9,015,685.00.

18. (1) Admitted
(2) Admitted with the following qualification:
The $1.8400 "County of Harris" tax rate for 1977 includes the County of Harris and certain other political subdivisions for

which its Assessor and Collector of Taxes is charged by law or contract to assess and collect as follows:

Harris County General Fund:	$1.1095
Harris County Flood Control District:	0.1410
Port of Houston Authority:	0.0545
Harris County School Equalization:	0.0100
Harris County Hospital District:	0.5250
Total	$1.8400

19. (1) Denied, the correct State of Texas tax for 1977 is $2,885.02 (2) Admitted with the following qualification: The $53,084.37 "County of Harris" tax includes the County of Harris and certain other political subdivisions for which its Assessor and Collector of Taxes is charged by law or contract to assess and collect as follows:

Harris County General Fund:	$32,009.30
Harris County Flood Control District:	4,067.88
Port of Houston Authority:	1,572.34
Harris County School Equalization:	288.50
Harris County Hospital District:	15,146.35
Total	$53,384.37

20. Admitted

21. Admitted

22. Admitted

23. Harris County admits that certain regulations promulgated by the Secretary of Transportation concerning Customs Bonded warehouses are contained in Title 19, C.F.R. § 19.1-19.12, however it has no knowledge as to whether these are the only such regulations.

24. Admitted

25. Admitted

26. (1) Admitted
(2) Admitted with the following qualification: The $2.02 "County of Harris" tax rate for 1976 includes the County of

Harris and certain other political subdivisions for which its Assessor and Collector of Taxes is charged by law or contract to assess and collect as follows:

Harris County General Fund:	$1.1571
Harris County Flood Control District:	0.1478
Port of Houston Authority:	0.0644
Harris County School Equalization:	0.0100
Harris County Hospital District:	0.6407
Total	$2.0200

27. (1) Admitted
(2) Admitted with the following qualification: The $45,710.58 "County of Harris" tax includes the County of Harris and certain other political subdivisions for which its Assessor and Collector is charged by law or contract to assess and collect as follows:

Harris County General Fund:	$26,184.02
Harris County Flood Control District:	3,344.57
Port of Houston Authority:	1,457.30
Harris County School Equalization:	226.29
Harris County Hospital District:	14,498.40
Total	$45,710.58

28. Admitted

29. Admitted, but such letter was issued erroneously by a deputy of the Assessor and Collector of Taxes of Harris County and not by Harris County, per se.

31. Admitted, but the name is H. F. Bruce.

32. Admitted, but such letter was issued erroneously by H. F. Bruce.

[Signature of counsel and certificate of service omitted in printing]

Plaintiff's Answers to Interrogatories—Filed December 6, 1979, District Court, Harris County, Texas.

[Title, signature of counsel and certificate of service omitted in printing]

ANSWERS TO INTERROGATORIES PROPOUNDED BY DEFENDANT, CITY OF HOUSTON

Question #1

What is the principal place of business in Texas of Xerox Corporation?

Answer

There is no one principal place of business in Texas for Xerox Corporation. Major business operations take place in Dallas, Arlington, Carrollton, Houston, Austin and San Antonio.

Question #2

Plaintiff alleges in its petition that the component parts of the copiers were manufactured in Rochester, New York, assembled in Mexico, and stored in Houston while awaiting ultimate delivery to various Latin American countries. Please describe in detail the journey of these foreign destined copiers from the time of manufacture to their delivery and sale. Please also describe the process of manufacture, assembly, distribution and sale, and include in your answer information regarding the following factors:

Answer

Parts and sub-assemblies are manufactured by Xerox Corporation or procured from United States suppliers and either warehoused in the Xerox facility in Webster, New York or other Xerox facilities in the United States. They are then shipped by common carrier to a warehouse in Laredo, Texas. Transfer is made to a Mexican common carrier which transports them under Mexican customs bond, to the Industrias Xerograficas Sociedad Anonimas (hereinafter

IXSA) manufacturing facility in Mexico City, D.F. The copying machines are assembled at this facility utilizing the same methods, tooling and gauging techniques as in the Xerox U.S. assembly facility. A substantial portion of the finished copiers are shipped by Mexican common carrier, under customs bond, to Nuevo Laredo, where the original Mexican bond is cleared on a part-by-part basis. Some are retained for Mexican consumption. They are transferred to a U.S. bonded common carrier, under U.S. customs bond, to the Houston Terminal Warehouse and Cold Storage Company (hereinafter HTWCSC). A warehouse entry is obtained from U.S. Customs in Houston to permit storage of goods under customs bond. Orders are filled from this inventory of machines as they are received from Xerox Latin American marketing subsidiaries. Machines are designated for shipment on a first-in first-out basis. Maher and Company, Xerox' customs broker in Houston, makes a bonded warehouse withdrawal through the U.S. customs office for shipment to the appropriate port (Miami or Houston) for exportation. Shipment from HTWCSC to the airplane or steamer at the appropriate port is made by U.S. common carrier under customs bond. The customs bond is removed at the point of exportation.

Process of Manufacture

No manufacturing process takes place in Mexico.

Process of Assembly

Consists of definite, precise sequence of assembling parts and components to achieve end product within Xerox worldwide quality specifications.

Process of Distribution

As described above.

Process of Sale

Copiers assembled by IXSA are transferred to the Xerox Latin American Group of Xerox Corporation at the point of exportation from Mexico. Xerox retains title during the period of storage at HTWCSC and until the point of exportation to a Latin American marketing subsidiary.

Question 2.a.

The difference, if any, between the manufacture and assembly of foreign and domestic copiers.

Answer

The differences between the assembly of foreign and domestic copiers are:

1. Domestic copiers must be UL and CSA (Canadian Standards Association) approved. Foreign copiers need not be.

2. Domestic copiers have 60 cycle HZ electrical requirements. Some copiers manufactured for the Latin American markets have 50 cycle HZ electrical requirements.

Question 2.b.

The reasons for utilizing the Mexican corporate affiliate for assembly of the component parts.

Answer

The reason for utilizing IXSA for assembly of component parts was to transfer technology to Mexico as well as to satisfy the Mexican government's request to rectify their negative balance of payments problem.

Question 2.c.

The reasons for returning the copiers to the United States and for their storage in Houston and in other domestic cities.

Answer

Houston was selected as a distribution point because of its good distribution facilities to the Latin American markets.

Question 2.d.

The events which lead to their ultimate export to Latin American countries.

Answer

The event which led to the ultimate export of copiers to Latin American Countries was the receipt of orders from Latin American subsidiaries.

Question 3.a.

When copiers first arrive in Houston, have identifiable copiers customarily been committed to or sold to Latin American customers?

Answer

A very minor percentage of identifiable copiers have been committed or sold as of arrival at HTWCSC.

Question 3.b.

If yes, please indicate what percentage of copiers are previously committed.

Answer

This has been estimated to be approximately one percent.

Question 4.a.

Please describe the difference between the design, feature and structure of a domestic copier and a foreign copier.

Answer

Electrical requirements differ; those to be used in the United States require UL/CSA approval; the labelling in Latin America will generally be in Spanish or Portuguese.

Question 4.b.

Are the component parts of the foreign copiers different from those of domestic copiers? If so, please explain.

Answer

There are some differences, primarily with electrical components and external cosmetics.

Question 4.c.

Can copiers manufactured for domestic commerce be converted for sale to Latin American customers, and *vice versa*. If so, what is the cost of such conversion.

Answer

Yes. Cost of conversion would be up to approximately $100.

Question 4.d.

Please attach diagrams of a foreign copier of a model stored in the Warehouse and a comparable model domestic copier which would illustrate the difference between their design, feature and structure, if you will do so without a motion and order to produce.

Answer

Xerox Corporation considers all diagrams or drawings with respect to both foreign and domestic copiers to be proprietary information.

Question 5.

In the accompanying Request for Admissions, the City of Houston has requested the admission to the following fact: "The number of copiers assessed on January 1, 1977 is fairly representative of the number of copiers stored at the Warehouse daily during the years 1976 and 1977." If the Plaintiff does not admit this fact, please summarize by month the number of copiers stored at the Warehouse between January 1, 1976 and December 31, 1977.

Answer

The plaintiff has admitted this fact.

Question 6.a.

What is the median length of time that copiers were stored at the Warehouse between January 1, 1976 and the time that Plaintiff discontinued use of the storage facilities in 1977.

Answer

It is not possible, without substantial and arduous record research and mathematical computations, to determine the median length of time.

Question 6.b.

Since initial use of the storage facilities in 1974, what is the longest period copiers have been stored in the Warehouse.

Answer

Over three years.

Question 6.c.

What is the shortest period of time.

Answer

Eight days.

Question 6.d.

When did Plaintiff discontinue using the Warehouse for storage of its foreign designated copiers?

Answer

December 22, 1977.

Question 7.a.

With respect to Plaintiff's allegation that the copiers were imported from Mexico for ultimate exportation to various Latin American countries, please attach copies of customs documentation if you will do so without a motion and order to produce. If you will not do so without a motion and order to produce, please give the name of Plaintiff's agent who has knowledge of, or custody and control over the requested information.

Answer

See attached documentation.

Question 7.b.

Did any of the copiers remain in the U.S. If so, please explain.

Answer

No. Even those which were transferred from the HTWCSC to Buffalo, New York when Xerox abandoned its Houston operation have been exported.

Question 7.c.

Were any copiers exported to other than Latin American or Caribbean countries. If so, please explain.

Answer

Yes. Several copiers were sold to an agency of the United States government. It was represented by that agency that these copiers were for use overseas. In addition, they were 50 cycle machines and did not have UL/CSA approval.

Question 8.

Please list the names (not exceeding 5) of the Xerox' Latin American competitors whose copiers are manufactured and assembled in the United States.

Answer

International Business Machines, Eastman Kodak Co., 3M Company.

Question 9.a.

Of the copiers stored in the Warehouse on January 1, 1979, had any identifiable copiers been committed to sale prior to January 1? If so, how many.

Answer

Of the copiers stored at the HTWCSC on January 1, 1976 and January 1, 1977 some, but at most a very minor percentage, may have been committed to sale. It is not possible to determine the exact answer from the records available to us.

Question 9.b.

Please briefly describe in general the terms of such sale arrangements.

Answer

All sale arrangements are the same, regardless of whether prior commitments have been made.

XEROX CORPORATION

/s/ RICARDO PEREZ
Ricardo Perez

[Jurat omitted in printing]

Defendant City of Houston's Request for Admission—Filed March 19, 1980, District Court, Harris County, Texas

[Title Omitted in Printing]

REQUEST FOR ADMISSION

TO: Xerox Corporation, Plaintiff
c/o Larry D. Tompson
Lorance, Thompson, & Wittig
Attorney for Plaintiffs
303 Jackson Hill at Memorial Drive
Suite 300
Houston, Texas 77007

PURSUANT TO THE PROVISIONS of Rule 169 of the Texas Rules of Civil Procedure, you are hereby requested to admit the truth of the fact stated below ten days after delivery of this request to Mr. Larry D. Thompson, your Attorney of Record. You are advised that, as provided in Rule 169, the matter stated below, of which admission is requested, will be deemed admitted unless a sworn statement is delivered to Cheryl Helena Chapman, Assistant City Attorney, City of Houston, P. O. Box 1562, Houston, Texas 77001, on or before the date above specified, or within such further time as the court may allow on motion and notice, either denying specifically the matter of which admission is requested herein, or setting forth in detail the reasons why said matter cannot truthfully be either admitted or denied.

During the years 1976 and 1977, the cost of assembling copier component parts in Mexico was less that the cost of assemblying the same component parts in the United States.

Respectfully submitted,

[Signature of counsel and certificate of service omitted in printing]

Defendant County of Harris' First Amended Answer and Counterclaim—Filed March 26, 1980, District Court, Harris County, Texas.

[Title omitted in printing]

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Harris County, Texas, a political subdivision of the State of Texas, one of the Defendants in the above entitled and numbered cause and for its First Amended Answer would respectfully show the Court as follows:

I.

Pursuant to Rule 92 of the Texas Rules of Civil Procedure, this Defendant asserts a general denial of the material allegations contained in the Plaintiff's First Amended Original Petition, and respectfully requests that Plaintiff be required to prove such allegations by a preponderance of the evidence as is required by the laws of the State of Texas.

II.

a) Now comes Harris County, Texas, as Counter-Plaintiff and brings this complaint for itself and the State of Texas, and for the use and benefit of all political subdivisions whose taxes are collected by the Assessor and Collector of Taxes for said Counter-Plaintiff.

b) The Counter-Defendant is Xerox Corporation, a New York Corporation licensed to do business in the State of Texas, which may be served by delivering citation to its Registered Agent, C.T. Corporation, Republic National Bank Building, Dallas, Texas, and who owns or owned or claims or claimed or has or had some interest in the property described as follows, to-wit:

> Personal property consisting of merchandise stored at the Houston Terminal Warehouse and Cold Storage in Houston, Harris County, Texas

c) That as to such personal property, there are delinquent taxes justly due, owing and upaid against the said property for the following years and amounts:

Years Delinquent	*To Whom Assessed*	*Amounts*
1976	Xerox Corporation	$48,426.06
1977	Xerox Corporation	$55,969.39

together with penalties, interest and costs provided by law or legally accruing thereon in the total amount of $125,349.97 as more particularly set forth in the Delinquent Tax Statements attached hereto and made a part hereof as Exhibits "A" and "B". This suit is also brought for such additional penalties, interest, and costs provided by law or legally accruing thereon as may become due and delinquent before judgment is rendered.

d) All of said taxes were authorized by law and have been duly and legally levied and assessed against said personal property and the owners thereof and Counter-Plaintiff now has and asserts a claim against said Counter-Defendant for the payment of all taxes, penalties, interest and costs due thereon; and all things required by law to be done have been duly and legally performed by the proper officials.

e) That all of said personal property was, at the time said taxes were assessed, located within the boundaries of Harris County, Texas.

f) The attorneys whose names are signed hereto are legally authorized and empowered to file this answer and counterclaim on behalf of the State of Texas and Harris County and each political subdivision of the State of Texas in whose behalf this Counterclaim is brought.

WHEREFORE, PREMISES CONSIDERED, Defendant and Counter-Plaintiff Harris County prays that Plaintiff and Counter-Defendant Xerox Corporation take nothing by its suit, and that this Defendant and Counter-Plaintiff have personal judgment against the Counter-Defendant Xerox Corpo-

ration for the total amount of said taxes together with all penalties, interest, costs and other charges or expenses that may be or become legally due and owing against said Counter-Defendant on account of said personal property, that this Counter-Plaintiff recover its costs of suit herein, and for such other and further relief as it may show itself to be entitled at law or in equity.

Respectfully submitted,

[Signature of counsel and exhibits
omitted in printing]

**Plaintiff's Answer to Defendant's Counterclaim—
Filed April 22, 1980,
District Court, Harris County, Texas.**

[Title omitted in printing]

ANSWER TO DEFENDANT'S COUNTERCLAIM

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Plaintiff and Counter-Defendant, XEROX CORPORATION, and for answer to Defendant's, HARRIS COUNTY, TEXAS, Counterclaim would respectfully show the Court the following:

I.

As provided in Rule 92 of the Texas Rules of Civil Procedure, Plaintiff and Counter-Defendant enters its general denial of matters pleaded by Defendant and Counter-Plaintiff and asks that these matters be properly decided by this Honorable Court and Jury.

WHEREFORE, Plaintiff and Counter-Defendant prays that Defendant and Counter-Plaintiff take nothing by its suit against it, and for such other and further relief, both general and special, at law and in equity to which it may show itself justly entitled.

Respectfully submitted,

[Signature of counsel and certificate
of service omitted in printing]

Plaintiff's Answer to Request for Admission—Filed May 2, 1980, District Court, Harris County, Texas.

[Title omitted in printing]

ANSWER TO REQUEST FOR ADMISSION

COMES NOW the Plaintiff, XEROX CORPORATION, and for answer to Request for Admission submitted by Defendant, CITY OF HOUSTON, would respectfully say as follows:

It is admitted that the cost of assembly of copier component parts in Mexico was less than the cost of assembly of the same component parts in the United States.

Respectfully submitted,

[Signature of counsel and certificate of service omitted in printing]

Plaintiffs' Amended Answers to Interrogatories—Filed May 8, 1980, District Court, Harris County, Texas.

[Title omitted in printing]

PLAINTIFF'S AMENDED ANSWERS TO INTERROGATORIES

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiff, XEROX CORPORATION, and submits amended answers to interrogatories previously propounded by the Defendant City of Houston.

Question No. 2:

Plaintiff alleges in its petition that the component parts of the copiers were manufactured in Rochester, New York, assembled in Mexico, and stored in Houston while awaiting ultimate delivery to various Latin American countries. Please describe in detail the journey of these foreign destined copiers from the time of manufacture to their delivery and sale. Please also describe the process of manufacture, assembly, distribution and sale, and include in your answer information regarding the following factors:

Answer:

Parts and sub-assemblies are manufactured by Xerox Corporation or procured from United States suppliers and either warehoused in the Xerox facility in Webster, New York or other Xerox facilities in the United States. They are then shipped by common carrier to a warehouse in Laredo, Texas. Transfer is made to a Mexican common carrier which transports them under Mexican customs bond, to the Industrias Xerograficas Sociedad Anonimas (hereinafter IXSA) manufacturing facility in Mexico City, D.F. The copying machines are assembled at this facility utilizing the same methods, tooling and gauging techniques as in the Xerox U.S. assembly facility. A substantial portion of the finished copiers are shipped by Mexican com-

mon carrier, under customs bond, to Nuevo Laredo, where the original Mexican bond is cleared on a part-by-part basis. Some are retained for Mexican consumption. They are transferred to a U.S. bonded common carrier, under U.S. customs bond, to the Houston Terminal Warehouse and Cold Storage Company (hereinafter HTWCSC). A warehouse entry is obtained from U.S. Customs in Houston to permit storage of goods under customs bond. Orders are filled from this inventory of machines as they are received from Xerox Latin American marketing subsidiaries. Machines are designated for shipment on a first-in first-out basis. Maher and Company, Xerox' customs broker in Houston, makes a bonded warehouse withdrawal through the U.S. customs office for shipment to the appropriate port (Miami or Houston) for exportation. Shipment from HTWCSC to the airplane or steamer at the appropriate port is made by U.S. common carrier under customs bond. The customs bond is removed at the point of exportation.

Process of Manufacture

Xerox does not manufacture but instead assembles copiers in Mexico City. However, approximately ten percent of the component parts were manufactured by third party vendors in Mexico.

Process of Assembly

Consists of definite, precise sequence of assembling parts and components to achieve end product within Xerox worldwide quality specifications.

Process of Distribution

As described above.

Process of Sale

Copiers assembled by IXSA are transferred to the Xerox Latin American Group of Xerox Corporation at the point of exportation from Mexico. Xerox retains title during the period of storage at HTWCSC and until the point of exportation to a Latin American marketing subsidiary.

Question 2.a.

The difference, if any, between the manufacture and assembly of foreign and domestic copiers.

Answer

The differences between the assembly of foreign and domestic copiers are:

1. Domestic copiers must be UL and CSA (Canadian Standards Association) approved. Foreign copiers need not be.

2. Domestic copiers are 60 cycle HZ electrical requirements. Some copiers manufactured for the Latin American markets have 50 cycle HZ electrical requirements.

Question 2.b.

The reasons for utilizing the Mexican corporate affiliate for assembly of the component parts.

Answer

The reason for utilizing IXSA for assembly of component parts was to transfer technology to Mexico as well as to satisfy the Mexican government's request to rectify their negative balance of payments problem.

Question 2.c.

The reasons for returning the copiers to the United States and for their storage in Houston and in other domestic cities.

Answer

Houston was selected as a distribution point because of its good distribution facilities to the Latin American markets.

Question 2.d.

The events which lead to their ultimate export to Latin American countries.

Answer

The event which led to the ultimate export of copiers to Latin American countries was the receipt of orders from Latin American subsidiaries.

Question 8.

Please list the names (not exceeding 5) of the Xerox' Latin American competitors whose copiers are manufactured and assembled in the United States.

Answer:

No major competitor of Xerox in Latin America manufactures and assembles copiers in the United States. The major competitors include IBM and 3M.

IBM's copiers in Latin America are manufactured in Germany.

Of the copiers sold by 3M in Latin America, the great majority of such copiers are manufactured by Toshiba in Japan. One very small line is manufactured in the United States.

There are some very minor companies in Latin America such as Saxon and Apeco whose copiers are manufactured or assembled in the United States. However, their total business in Latin America would account for perhaps one to one and a half percent of the market.

Eastman Kodak does not sell copiers in Latin America.

XEROX CORPORATION

/s/ RICARDO PEREZ
Ricardo Perez

[Jurat and certificate of service omitted in printing]

Revised Judgment—Entered, September 9, 1980, District Court, Harris County, Texas.

IN THE

DISTRICT COURT OF HARRIS COUNTY, TEXAS

165th JUDICIAL DISTRICT

NO. 1,146,343

XEROX CORPORATION,

Plaintiff,

—v.—

HARRIS COUNTY, TEXAS, and THE CITY OF HOUSTON,

Defendants.

JUDGMENT

On the 7th day of July, 1980, this cause was heard, in the absence of application for a jury, by the Court. The plaintiff appeared through its attorney of record. The defendant in behalf of itself and for the use and benefit of the Houston Independent School District, appeared through its attorney of record. The defendant in behalf of itself and for the use and benefit of the State of Texas, the Harris County Flood Control District, the Port of Houston Authority, the Harris County Board of School Trustees, and the Harris County Hospital District, appeared through its attorney of record.

After presentation of evidence and argument of counsel, the Court considered that judgment should be rendered in favor of the plaintiff.

It is, therefore:

1. Adjudged that the ad valorem taxes sought to be imposed on the photocopiers by the defendants for the years 1976 and 1977 are illegal;

2. Decreed that the defendants are permanently enjoined from assessing, collecting, and enforcing the ad valorem taxes against Xerox Corporation for any of its personal property situated similarly to the photocopiers;

3. Adjudged that all relief sought by the defendants in their counter-claims is denied, and that all other relief prayed for by the plaintiff is denied; and

4. Ordered that the plaintiff's costs of court shall be borne by the plaintiff, and the defendant's costs shall go untaxed.

Signed this 9th day of September, 1980.

/s/ LYNN N. HUGHES
Lynn N. Hughes
District Judge

Order Directing Inclusion of Original Exhibits in the Statement of Facts and Forwarding of Depositions— Filed, October 22, 1980, District Court, Harris County, Texas.

[Title Omitted in Printing]

THE COURT, having considered Defendant Harris County's Motion For Inclusion Of Original Exhibits In The Statement Of Facts and Forwarding of Depositions and noting that Counsel for Xerox Corporation and the City of Houston (being the other parties in the above entitled and numbered cause) have approved said Motion and have waived hearing thereon, is of the opinion that said Motion should be granted.

IT IS THEREFORE ORDERED that all of the original exhibits introduced upon the trial of the above entitled and numbered cause on July 7, 1980, be delivered by the Clerk of the Court to the Official Reporter of the Court for inclusion in the Statement of Facts in this cause pursuant to Rules 75b and 379 T.R.C.P., to wit:

Exhibit No.	*Description*
Plaintiff - 1	U. S. Customs Warning Label.
Plaintiff - 3	D. I. S. C. - A Handbook for Exporters.
Defendant City - 1	City of Houston and/or Houston Independent School District Tax Statement.
Defendant City - 2	Excerpt from City of Houston and Houston Independent School District Tax Rolls.
County - 1	Harris County, Texas and Harris County Flood Control District Annual Financial Statements and Supplementary Information for the Year Ended December 31, 1976.

County - 2	Harris County, Texas and Harris County Flood Control District Financial Statements and Supplementary Information for the Year Ended December 31, 1977.
County - 3	Harris County, Texas and Harris County Flood Control District Comprehensive Annual Financial Reports for the Year Ended December 31, 1978.
County - 4	Port of Houston Authority of Harris County, Texas Annual Financial Statements and Supplementary Information for the Year Ended December 31, 1976.
County - 5	Port of Houston Authority of Harris County, Texas Financial Statements and Supplementary Information for the Year Ended December 31, 1977.
County - 6	Port of Houston Authority of Harris County, Texas Comprehensive Annual Financial Report for the Year Ended December 31, 1978.
County - 7	Harris County Hospital District-Budget-Fiscal Year Ending March 31, 1977.
County - 8	Harris County Hospital District-Budget-Fiscal Year Ending March 31, 1978.
County - 9	Report of Examination, Harris County Department of Education for the Fiscal Years Ended in 1977.
County - 10	Report of Examination, Harris County Department of Education for the Fiscal Years and the Periods Ended in 1978.

County - 11	Carl S. Smith, Tax Statement.
County - 12	Certificate of Imported Merchandise Exemption by J. S. Vangellow of Xerox.
County - 13	Certificate of Imported Merchandise Exemption by Bruce Anderson of Xerox with attached letter by Ricardo S. Perez of Xerox.
County - 14	Letter to Xerox from Carl S. Smith Tax Assessor-Collector by H. F. Bruce dated August 9, 1976.

IT IS FURTHER ORDERED that upon the conclusion of all appeals of the Court's Judgment in the above entitled and numbered cause, the hereinabove listed exhibits shall be returned to the Clerk of the Court for safekeeping pending disposition in accordance with the law and further orders of the Court.

IT IS FURTHER ORDERED that the Clerk of the Court is directed to transmit the depositions and exhibits attached thereto taken in the hereinabove entitled and numbered cause of Ralph E. Benzaquen dated May 9, 1980, and Mario Augusta Blanca dated June 11, 1980, to the Court of Civil Appeals as a part of the record herein.

Signed this 22nd day of October, 1980.

/s/ LYNN N. HUGHES
Lynn N. Hughes
District Judge

[Signature of counsel omitted in printing]

**Appendix To Brief of Defendant County of Harris—
Filed December 9, 1980, Texas Court of Civil Appeals.**

APPENDIX "A"

For the convenience of the Court, the County of Harris submits the following authorities which are cited in its brief and/or in *McGoldrick vs. Gulf Oil Corp.*, 60 S.Ct. 664 (1940):

1. Excerpts from the Customs Regulations of 1915.
2. Excerpts from the Customs Regulations of 1923.
3. Excerpts from the Customs Regulations of 1931.
4. Excerpts from the Customs Regulations of 1937.
5. The excerpts from the Senate Report and Congressional Record as cited at 60 S.Ct., page 669 in *McGoldrick*.

All other authorities cited in Appellants Brief are believed to be available in the Harris County Law Library.

TREASURY DEPARTMENT

DIVISION OF CUSTOMS

CUSTOMS REGULATIONS

OF THE

UNITED STATES

Prescribed for the Instruction and Guidance
of Customs Officers

EDITION OF 1915

[SEAL]

WASHINGTON
GOVERNMENT PRINTING OFFICE
1915

ORDER OF PUBLICATION.

TREASURY DEPARTMENT, *August 13, 1915.*

The following regulations are published for the instruction and guidance of all officers and employees of the customs.

This volume is to be known and cited as the "Customs Regulations of 1915." References thereto in official correspondence are to be made to the article number and not to the chapter or page.

Collectors and other chief officers of the customs are instructed to require all officers and employees under their jurisdiction to familiarize themselves with these regulations, and particularly with those portions thereof pertaining to the specific duties to which such officers or employees are assigned.

These regulations are to be strictly observed and followed by all officers and employees of the customs unless compliance be expressly waived in writing by the department.

W.G. MCADOO,
Secretary of the Treasury.

[217] * * *

WITHDRAWAL OF SUPPLIES FOR MERCHANT VESSELS OF THE UNITED STATES.

Act June 26, 1884, sec. 16; act July 24, 1897, sec. 14. T. Ds. 9776, 9787, 18379, 18922, 23237.

Art. 410. Form of withdrawal.—When articles of foreign or domestic production are withdrawn from a bonded warehouse or a bonded manufacturing warehouse for supplies of a vessel of the United States engaged in [218] foreign trade, or in trade between the Atlantic and Pacific ports of the United States, free of duty or of internal-revenue tax, the owner of the articles or his agent must file with the collector a withdrawal in the following form:

Withdrawal of supplies for vessels.

Articles to be withdrawn from warehouse by _____ _____, and to be used for supplies of _____, _____ _____, master, a vessel of the United States engaged in the foreign trade (or in the trade between the Atlantic and Pacific ports of the United States), now in port.

Description of articles.	*Marks and numbers.*	*Dates of importation or re-warehousing and names of importers or dates of withdrawal from bonded manufacturing warehouses.*	*Amount of duty or tax.*

I do solemnly swear that the articles described within are intended to be used on board the above-described vessel and not to be relanded at any place or port within the United States.

_____ _____,

PORT OF _____ _____,

Sworn to this _____ day of _____, ____, before me.

_____ _____,

Collector.

Art. 411. Bond.—If the vessel named in the withdrawal is clearing coastwise, or goes from port to port in the United States to complete lading or unlading of cargo to and from foreign ports, or to and from Atlantic and Pacific ports of the United States, a bond must be taken on Customs Form 3879 and in a penal sum equal to double the duties on the articles withdrawn.

Art. 412. Delivery permit—Lading.—Upon the filing of the withdrawal and executing a bond, when required, the collector, if satisifed that the quantities mentioned in the withdrawal are not excessive for the purpose intended, shall issue a permit on Customs Form 3881, directing the storekeeper to deliver the supplies to the surveyor.

A copy of the withdrawal will be transmitted to the surveyor or inspector acting as such, with directions indorsed thereon in the following form:

[219] PORT OF _____ _____,
_____ _____, 19____.

TO THE SURVEYOR:

You will direct an inspector to examine the goods described in this withdrawal, and if found to agree exactly therewith to superintend the lading thereof on board the _____, and make return thereof.

_____ _____,
Collector.

Art. 413. Intermediate ports.—The articles withdrawn and taken on board as supplies shall be noted on the manifest, and if the vessel touches at an intermediate port in the United States the collector at such port shall see that no portion of the supplies so noted is landed except upon entry and payment of duties.

Art. 414. Cancellation of bond.—The bond given on withdrawal of supplies shall be canceled upon the production of an affidavit of the master and mate, showing that

such supplies have been used on board the vessel, and no portion thereof landed within the limits of the United States without the payment of duty thereon.

WITHDRAWAL OF SUPPLIES FOR FOREIGN VESSELS OF WAR.

Art. 415. Countries accorded privilege.—The privilege of purchasing supplies from the public or bonded warehouses and from bonded manufacturing warehouses, free of duty or of internal-revenue tax, shall be extended to the vessels of war of any nation in ports of the United States which may reciprocate such privilege toward the vessels of war of the United States in its ports.

Act Oct. 3, 1913, sec. IV, par. K. T. Ds. 13111, 13467, 22327, 22006, 29939.

The privilege of purchasing supplies from such warehouses, duty free, is accorded to the vessels of war of the following countries: Argentina, Austria, Brazil, Chile, Denmark, England, France, Germany, Greece, Holland, Italy, Japan, Korea, Norway, Roumania, Russia, Salvador, Siam, Sweden, and Venezuela.

[352] * * *

Art. 709. Classes 1 to 7.—Warehouses for the storage of bonded merchandise shall be used exclusively for that purpose, and for the storage of unclaimed goods under Government control, and shall be divided into the following classes:

R. S., 2969.

CLASS 1. Warehouses which are owned or leased by the Government and used for the storage of merchandise undergoing examination by the appraiser; for the storage of seized and unclaimed goods and for other purposes, shall be known as "public stores." Such warehouses or parts thereof used exclusively for the storage of seized and unclaimed goods shall be known as "general-order stores." Where such stores are not sufficient or available for the storage of seized and unclaimed goods, such goods [353] may be stored in a warehouse of class 3. If there be no warehouse of the latter class at a port, the collector may, with the approval of the Department, rent suitable premises for the temporary storage of seized or unclaimed goods.

R. S., 2954.

CLASS 2. Importers' private bonded warehouses used exclusively for the storage of imported merchandise owned and entered for warehouse by the proprietors.

Cellars and vaults may, in the discretion of the Department, be bonded in this class for the storage of wines and spirits only. R. S. 2958, 2960.

CLASS 3. Bonded warehouses used for the general storage of imported goods.

A warehouse of this class shall consist of an entire building, or of a part of a building entirely separated from the rest of the building by suitable partitions or walls. R. S. 2960.

CLASS 4. Bonded yards or sheds for the storage of heavy and bulky imported merchandise.

Warehouses of this class shall be used exclusively for the storage of heavy or bulky articles. The yards must be inclosed by substantial fences, not less than 12 feet in height, with entrance gates capable of being secured by customs locks. R.S. 2958.

The collector may send to such yards unclaimed or seized goods of the character described in this article.

Stables or parts thereof may be bonded upon approval of the department for the storage of animals.

CLASS 5. Bonded bins or parts of buildings or of elevators to be used for the storage of grain.

The bonded portion must be separated from the rest of the buildings. R. S. 2939.

Warehouses of class 4 or 5 may be bonded exclusively for the storage of goods imported by the proprietor, in which case they will be designated as "Importers' private warehouses."

CLASS 6. Warehouses for the manufacture in bond, solely for exportation, of articles made in whole or in part of imported materials or of materials subject to internal-revenue tax; for the manufacture for home consumption or exportation of cigars in whole of tobacco imported from one country; also for the storage and cleansing of imported rice intended for exportation. Act Oct. 3, 1913, sec. IV, par. M. Act Mar. 24, 1874.

[354] CLASS 7. Warehouses for smelting and refining imported ores and crude metals for exportation or domestic consumption. Act Oct. 3, 1913, sec. IV, par. N, subsec. 1.

STORAGE WAREHOUSES.

Art. 710. Application to bond.—In order to establish a bonded warehouse the owner or lessee shall make application in writing to the collector, describing the premises and location and stating the class of warehouse.

The application must be accompanied by a certificate signed by the president or secretary of a board of fire underwriters, where such board exists, and at other ports by the officers or agents of two or more insurance companies, stating that the building is a suitable warehouse, acceptable for fire insurance purposes.

After the collector has examined or caused an examination to be made of the premises he will transmit to the Department with his recommendation the application, the insurance certificates, and a report stating the particulars relative to the location, construction, and dimensions of the building, its suitability for the storing of merchandise, whether the building is detached or adjoins other buildings, the location of doors, and all other material facts.

Art. 711. Execution of bond.—On approval of the application, a bond shall be executed in duplicate on the prescribed form, in such penalty and with such security as the collector may deem proper, and forwarded to the Department for approval. R. S., 2961. T. D. 24554.

Bonds may be executed in anticipation of approval and transmitted with the application.

Art. 712. Bond—Renewal of.—The proprietors or occupants of bonded warehouses may be required on 10 days' notice from the collector to renew their bonds; and if they fail so to do no more goods shall be sent to their warehouses, and those therein shall be removed at their expense.

Art. 713. New bond—When necessary.—The collector will promptly notify the Secretary of the Treasury of the death, pecuniary embarrassment, insolvency, or change of status of any of the parties to the bond, or of any circumstances which require a new bond.

If a bonded warehouse is destroyed and rebuilt a new bond will be required.

[358] * * *

Art. 728. Transfer to another warehouse.—Merchandise may be transferred from one bonded warehouse to another in the same port on the written request of the owner or importer to the collector, who will issue an order, Customs Form 3725, directing the removal of the merchandise under customs supervision at the risk and expense of the party requesting it.

All charges must be paid before goods are transferred from a warehouse of class 1.

Art. 729. Examination packages.—Merchandise sent from a bonded warehouse to the appraiser's stores for examination shall be returned to the warehouse for delivery unless the warehouseman shall indorse on the duty-paid permit that his charges have been paid.

Art. 730. Proprietor responsible for goods.—The warehouseman is responsible for the safe-keeping of the goods stored in any bonded warehouse, the Government being concerned solely for the security of the revenue.

R. S., 2961. T. D. 24[illegible]8.

Art. 731. Control of merchandise in bonded warehouse.—Merchandise in bonded warhouse is subject only to the orders and decrees of the United States courts. It is not subject to levy, attachment, or other process of a State court, and collectors can not be enjoined by State courts from delivering such merchandise to importers or their assigns.

R. S., 934. T. Ds. 16693, 16896, 17188, 17720, 19340.

The Government will not compel a warehouseman to deliver bonded goods, as the interest of the Government is in the collection of the duty on the merchandise or its exportation, and any question of infringement of private rights by the warehouseman must be left to parties in interest.

T. Ds. 16545, 19242, 19378, 19513.

Imported goods in bonded warehouse are exempt from taxation under the general laws of the several States.

Low v. Austin, 13 Wallace, 20; Clarke v. Clarke, 3 Woods, 408. Blount v. Munroe, 60 Ga. 61; State v. Pinckney, 10 Rich. L. 474, T.D. 21158.

* * *

TREASURY DEPARTMENT
DIVISION OF CUSTOMS

CUSTOMS REGULATIONS
OF THE
UNITED STATES

Prescribed for the Instruction and Guidance
of Customs Officers

EDITION OF 1923

[SEAL]

Washington
Government Printing Office
1924

ORDER OF PUBLICATION.

TREASURY DEPARTMENT, *May 27, 1924.*

The following regulations are published for the instruction and guidance of all officers and employees of the customs.

This volume is to be known and cited as the "Customs Regulations of 1923," and is revised in accordance with the pertinent treasury decisions up to and including T. D. 39938 of December 31, 1923.

References to these regulations in official correspondence are to be made to the article numbers and not to the chapters or pages.

Collectors and other chief officers of the customs are directed to require all officers and employees under their jurisdiction to familiarize themselves with the regulations, and particularly with those portions thereof pertaining to the specific duties to which such officers or employees are assigned.

These regulations are to be strictly observed and followed by all customs officers and employees unless compliance be expressly waived in writing.

A. W. MELLON,
Secretary of the Treasury

[246] * * *

MERCHANT VESSELS OF THE UNITED STATES—WITHDRAWAL OF SUPPLIES FOR.

Act June 25, 1894, sec. 16; act July 24, 1897, sec. 14.
T.Ds. 9776, 9787, 18379, 18922, 23237 T.D. 35535.

Art. 433. Form of withdrawal.—When articles of foreign or domestic production are withdrawn from a bonded warehouse or a bonded manufacturing warehouse for supplies of a vessel of the United States engaged in foreign trade, or in trade between the Atlantic and Pacific ports of the United States, free of duty or of internal-revenue tax, the owner of the articles or his agent must file with the collector a withdrawal on Custom Form 7506.

Art. 434. Bond.—If the vessel named in the withdrawal is clearing coastwise, or goes from port to port in the United States to complete lading or unlading of cargo to and from foreign ports, or to and from Atlantic and Pacific ports of the United States, a bond must be taken on Customs Form 7561 and in a penal sum equal to double the duties on the articles withdrawn.

Art. 435. Delivery permit—Lading.—Upon the filing of the withdrawal and executing a bond, when required, the collector, if satisfied that the quantities mentioned in the withdrawal are not excessive for the purpose intended, shall issue a permit on Customs Form 7506A, directing the storekeeper to deliver the supplies to the surveyor.

A copy of the withdrawal will be transmitted to the surveyor or inspector acting as such, with directions indorsed thereon in the following form:

Port of _____,
____, 19__.

To the Surveyor:

You will direct an inspector to examine the goods described in this withdrawal, and if found to agree exactly therewith, to superintend the lading thereof on board the __, and make return thereof.

_____ _____,
Collector.

Art. 436. Intermediate ports.—The articles withdrawn and taken on board as supplies shall be noted on the manifest, and if the vessel touches at an intermediate port in the United States the collector at such port shall see that no portion of the supplies so noted is landed except upon entry and payment of duties.

[247] Art. 437. Cancellation of bond.—The bond given on withdrawal of supplies shall be canceled upon the production of an affidavit of the master and mate, showing that such supplies have been used on board the vessel, and no portion thereof landed within the limits of the United States without the payment of duty thereon.

FOREIGN VESSELS OF WAR, WITHDRAWAL OF SUPPLIES FOR.

Art. 438. Countries accorded privilege.—The privilege of purchasing supplies from the public or bonded warehouses and from bonded manufacturing warehouses, free of duty or of internal-revenue tax, shall be extended to the vessels of war of any nation in ports of the United States which may reciprocate such privilege toward the vessels of war of the United States in its ports.

Tariff act of 1922, sec. 309

The privilege of purchasing supplies from such warehouses, duty free, is accorded to the vessels of war of the following countries: Argentina, Austria, Brazil, Chile, Denmark, England, France, Greece, Holland, Italy, Japan, Korea, Norway, Rumania, Russia, Salvador, Siam, Sweden, and Venezuela.

ARTICLES EXPORTED FOR EXHIBITION.

Art. 439. Articles entitled to privilege.—Animals and other articles of foreign or domestic origin sent out of the United States for temporary use or exhibition at a public exhibition, fair, or conference held in a foreign country may be admitted free of duty on their return to the United States, provided that dutiable articles shall have once paid duty in the United States, and no drawback has been allowed

Act May 18, 1895.
T. Ds. 17202 20819, 29950, 3730

thereon, and that internal-revenue tax shall have been paid before exportation and not refunded on domestic articles subject to such tax.

Art. 440. Procedure on entry.—There shall be required on the entry of such articles—

(*a*) A certificate of exportation, Customs Form 4467, or a bond for its production on Customs Form 7551.

(*b*) A declaration made by the foreign shipper before the United States consul, stating that such articles were sent from the United States for temporary exhibition, or a bond for its production on Customs Form 7551.

(*c*) A declaration of the importer on Customs Form 3329 for merchandise of either domestic or foreign origin.

[439] * * *

Art. 829. Public stores and bonded warehouses—Classes 1 to 8.—CLASS 1. Premises owned or leased by the Government and used for the storage of merchandise undergoing examination by the appraiser, under seizure or pending final release from customs custody, shall be known as a "public store." Unclaimed merchandise stored in such premises shall be held under "general order." Where such premises are not sufficient or available for the storage of seized and unclaimed goods, such goods may be stored in a warehouse of class 3. If there be no warehouse of that class, the collector may, with the approval of the department, rent suitable premises for the storage of seized and unclaimed goods.

Tariff act of 1922, sec. 551.

CLASS 2. Importers' private bonded warehouses used exclusively for the storage of merchandise belonging or consigned to the proprietor thereof.

Sec. 535.

CLASS 3. Public bonded warehouses used exclusively for the storage of imported merchandise generally.

A warehouse of this class shall consist of an entire building, or a part of a building entirely separated from the rest of the building by suitable partitions or walls.

CLASS 4. Bonded yards or sheds for the storage of heavy and bulky imported merchandise.

[440] Warehouses of this class shall be used exclusively for the storage of heavy and bulky articles. The yards must be inclosed by substantial fences, not less than 12 feet in height, with entrance gates capable of being secured by customs locks.

The collectors may send to such yards unclaimed or seized goods of a character above described.

Stables or parts thereof may be bonded upon approval of the department for the storage of animals.

CLASS 5. Bonded bins or parts of buildings or of elevators to be used for the storage of grain. The bonded portions must be separate from the rest of the building.

Warehouses of class 4 or 5 may be bonded exclusively for the storage of goods imported by the proprietor thereof, in which case they will be designated as "importers' private warehouses."

CLASS 6. Warehouses for the manufacture in bond, solely for exportation, of articles made in whole or in part of imported materials or of materials subject to internal-revenue tax; and for the manufacture for home consumption or exportation of cigars in whole of tobacco imported from one country.

Tariff act of 1922, sec. 311.

CLASS 7. Warehouses bonded for smelting and refining imported ores and crude metals for exportation or domestic consumption.

CLASS 8. Bonded warehouses established for the purpose of cleaning, sorting, repacking, or otherwise changing in condition, but not manufacturing, imported merchandise, under customs supervision and at the expense of the proprietor.

Sec. 312.

Secs. 535, 562, T.D. 35527.

Such merchandise may be withdrawn for exportation, without payment of the duties, or for consumption upon the payment of duties accruing thereon in its condition at time of withdrawal. The scouring or carbonizing of wool in such

bonded warehouse shall not be considered a process of manufacture.

Art. 830. Superintendent of warehouses. A customs officer will be designated as superintendent of warehouses at ports where the business may require such an officer, whose duty it shall be to supervise the proceedings at the several bonded warehouses by visiting each of them frequently in order to insure the promptness and efficiency of the storekeepers, the accuracy of the books and reports, and the observance of all official orders and regulations. He will promptly report to the collector any irregularities which may occur.

* * *

[445] Art. 845. Storage charges.—When merchandise is stored in a public store under warehouse entry, general order, or otherwise, the charges for storage due the Government must be collected before the packages are delivered therefrom.

Art. 846. Examination of goods by importer—Sampling—Repacking.—Importers may, upon application approved by the collector, examine, sample and repack (for preservation only) merchandise in bonded warehouse under the supervision of the storekeeper. Tariff act of 1922, secs. 557 562.

Art. 847. Transfer to another warehouse.—Merchandise may be transferred from one bonded warehouse to another in the same port on the written request of the owner or importer to the collector, who will issue an order, Customs Form 7500-A, directing the removal of the merchandise under customs supervision at the risk and expense of the party requesting it. T.D. 35536.

All charges must be paid before goods are transferred from a warehouse of class 1.

Art. 848. Examination packages.—Merchandise sent from a bonded warehouse to the appraiser's stores for examination shall be returned by the collector to the ware-

house for delivery unless the warehouseman shall indorse on the duty-paid permit that his charges have been paid.

Art. 849. Proprietor responsible for goods.—The warehouseman is responsible for the safe-keeping of the goods stored in any bonded warehouse, the Government being concerned solely in the security of the revenue. T.D. 24118.

Art. 850. Control of merchandise in bonded warehouse.—Merchandise in bonded warehouse is subject only to the orders and decrees of the United States courts. It is not subject to levy, attachment, or other process of a State court, and collectors can not be enjoined by State courts from delivering such merchandise to importers or their assigns. R.S. 934. T.Ds. 16693, 16896, 17188, 17 19340.

The Government will not compel a warehouseman to deliver bonded goods, as the interest of the Government is in the collection of the duty on the merchandise or its exportation, and any question of infringement of private rights by the warehouseman must be left to parties in interest. T.Ds. 16545, 19242, 19378, 19

Imported goods in bonded warehouse are exempt from taxation under the general laws of the several States. Low v. Austin 13 Wallace. 20; Clarke v. Clarke 3 Woods. 405. Blount v. Munro 60 Ga. 61: State v. Pinckney, 10 Rich. L. 474, T.D. 21158.

U.S. TREASURY DEPARTMENT
BUREAU OF CUSTOMS

CUSTOMS REGULATIONS
OF THE
UNITED STATES

Prescribed for the Instruction and Guidance
of Customs Officers

EDITION OF 1931

[SEAL]

United States
Government Printing Office
Washington : 1932

ORDER OF PUBLICATION

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C.

The following regulations are published for the instruction and guidance of all officers and employees of the customs.

This volume is to be known and cited as the "Customs Regulations of 1931," and is a revision of the customs regulations in accordance with the pertinent Treasury decisions up to and including T.D. 45347 of December 11, 1931.

References to these regulations in official correspondence are to be made to the article numbers and not to the chapters or pages.

Collectors and other chief officers of the customs are directed to require all officers and employees under their jurisdiction to familiarize themselves with the regulations, and particularly with those portions thereof pertaining to the specific duties to which such officers and employees are assigned.

These regulations are to be strictly observed and followed by all customs officers and employees unless compliance therewith be expressly waived in writing.

F.X.A. EBLE,
Commissioner of Customs.

Approved January 6, 1932:

A.W. MELLON,
Secretary of the Treasury.

[311] * * *

VESSELS—WITHDRAWAL OF SUPPLIES FOR

Art. 455. Exemption from customs duties and internal-revenue tax.—(*a*) Tariff act of 1930, section 309 (a): T.D. 9776, 9787, 18379, 18922, 23237, 38535, 44477.

> Articles of foreign or domestic manufacture or production may, under such regulations as the Secretary of the Treasury may prescribe, be withdrawn from bonded warehouses or bonded manufacturing warehouses free of duty or internal-revenue tax for supplies (not including equipment) of vessels of war, in ports of the United States, of any nation which may reciprocate such privilege toward the vessels of war of the United States in its ports, or for supplies (not including equipment) of vessels of the United States employed in the fisheries or in the whaling business, or actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or between the United States and any of its possessions, but no such article shall be landed at any port or place in the United States or in any of its possessions.

(*b*) Unless a vessel is operating on a regular schedule in a class of trade which entitles it to the privilege, it is not considered to be actually engaged in the foreign trade, or in trade between the Atlantic and Pacific ports of the United States or between the United States and its possessions, unless it actually clears from the port where the withdrawal is made for a foreign port, a port on the opposite coast of the United States, or clears from a port in the United States to a port in one of its possessions (or [312] vice versa), as the case may be; but the fact that a vessel so clearing intends to stop at an intermediate port before reaching the port for which it cleared, for the purpose of lading or unlading cargo or passengers, will not debar it from claiming the privilege.

Art. 456. United States Government vessels—Foreign war vessels.—(*a*) As United States war vessels, transports, and vessels belonging to the United States engaged exclusively in T. D. 44500.

the transportation of Government property, are not engaged in trade, they are excluded from the privilege of withdrawing supplies free of duty under section 309 (a).

(*b*) The privilege may be accorded to vessels of war of the following countries: Argentina, Austria, Brazil, Chile, Denmark, England, France, Germany, Greece, Holland, Italy, Japan, Korea, Norway, Rumania, Salvador, Siam, Sweden, and Venezuela.

Art. 457. Form of withdrawal—Bond.—(*a*) Withdrawals shall be made on customs Form 7506.

(*b*) If the vessel named in the withdrawal is clearing coastwise, or in the case of a vessel in the foreign trade, goes from port to port in the United States to complete lading or unlading of cargo or passengers, and the withdrawal is made by a person other than the importer of record, a bond must be taken on customs Form 7561.

(*c*) No bond shall be required in the case of war vessels.

Art. 458. Delivery permit—Lading.—(*a*) Upon the filing of the withdrawal and the execution of the bond, when required, the collector shall issue a permit on customs Form 7506A.

(*b*) A copy of the withdrawal will be transmitted to the surveyor or inspector acting as such, who shall designate a customs officer to supervise the lading of the merchandise and make a return thereof.

(*c*) The merchandise shall be entered on the store list of the vessel on which laden, which fact shall be certified by the marine clerk or officer acting as such on the withdrawal.

Art. 459. Intermediate ports.—A copy of the store list showing the articles withdrawn and taken on board as supplies shall be made on or attached to the manifest, and if the vessel touches at an intermediate port in the United States the collector at such port shall see that no portion of

the supplies so noted is landed except upon entry and payment of duties.

[313] Art. 460. Vessels diverted after clearance.—When, subsequent to clearance, a vessel which has withdrawn supplies free of duty is diverted to a class of trade not entitled to the privilege, the parties in interest shall immediately notify the collector of customs at the port of withdrawal, who shall cancel the conditional withdrawal and collect duty on such supplies. Whenever any such diversion comes to the attention of a collector of customs at any port in the United States, he shall likewise notify the collector at the port of withdrawal.

Art. 461. Cancellation of bonds.—The bond given on withdrawal of supplies shall be canceled upon the production of an affidavit of the master or other officer of the vessel having knowledge of the facts, showing that such supplies have been used on board the vessel, and no portion thereof landed within the limits of the United States or any of its possessions.

Art. 462. Tobacco products.—(*a*) Tariff act of 1930, section 317:

> The shipment or delivery of manufactured tobacco, snuff, cigars, or cigarettes, for consumption beyond the jurisdiction of the internal-revenue laws of the United States, as defined by section 3448 of the Revised Statutes, shall be deemed exportation within the meaning of the customs and internal-revenue laws applicable to the exportation of such articles without payment of duty or internal-revenue tax.

(*b*) As provided in section 3448 R. S. (U.S. Code, title 26, sec. 1178), the jurisdiction of the internal-revenue laws extends to all territory within the exterior boundaries of the United States; that is, within the 3-mile limit.

(*c*) Imported manufactured tobacco, snuff, cigars, and cigarettes in bonded warehouse or otherwise in customs

custody, and such articles manufactured with the use of imported materials in a bonded manufacturing warehouse of class 6, may be withdrawn under section 317 for consumption beyond the 3-mile limit or international boundary, as the case may be, on vessels whether foreign or domestic, actually engaged in the foreign trade, or operating on a regular schedule in trade between one great district of the United States and another great district thereof, or between the United States and the Philippine Islands, the Virgin Islands, American Samoa or the island of Guam, or actually clearing for such places or on vessels of war or other governmental activity, including vessels belonging to the United States, in, or en route to, places outside the jurisdiction of the internal-revenue laws.

* * *

[579] (*c*) Tariff act of 1930, section 560:

> The Secretary of the Treasury [Commissioner of Customs] may cause to be set aside any available space in a building used as a customhouse for the storage of bonded merchandise or may lease premises for the storage of unclaimed merchandise or other imported merchandise required to be stored by the Government, and set aside a portion of such leased premises for the storage of bonded merchandise: *Provided,* That no part of any premises owned or leased by the Government may be used for the storage of bonded merchandise at any port at which a public bonded warehouse has been established and is in operation. All the premises so leased shall be leased on public account and the storage and other charges shall be deposited and accounted for as customs receipts, and the rates therefor shall not be less than the charges for storage and similar services made at such port of entry by commercial concerns for the storage and handling of merchandise. No collector or other officer of the customs shall own, in whole or in part, any bonded warehouse or

enter into any contract or agreement for the lease or use of any building to be thereafter erected as a public store or warehouse. No lease of any building to be so used shall be taken for a longer period than three years, nor shall rent for any such premises be paid, in whole or in part, in advance.

(*d*) Tariff act of 1930, section 561:

Any premises owned or leased by the Government and used for the storage of merchandise for the final release of which from customs custody a permit has not been issued shall be known as a "public store."

(*e*) Tariff act of 1930, section 562:

Unless by special authority of the Secretary of the Treasury [Commissioner of Customs] no merchandise shall be withdrawn from bonded warehouse in less quantity than an entire bale, cask, box, or other package; or, if in bulk, in the entire quantity imported or in a quantity not less than one ton weight. All merchandise so withdrawn shall be withdrawn in the original packages in which imported unless, upon the application of the importer, it appears to the collector that it is necessary to the safety or preservation of the merchandise to repack or transfer the same: * * *

(*f*) Tariff act of 1930, section 312:

The works of manufacturers engaged in smelting or refining, or both, of ores and crude metals, may, upon the giving of satisfactory bonds, be designated as bonded smelting warehouses. * * *

CLASSES OF CUSTOMS WAREHOUSES

Art. 921. Public stores and bonded warehouses—Classes 1 to 8.—CLASS 1. Premises owned or leased by the Government and used for the storage of merchandise undergoing

examination by the appraiser, under seizure or pending final release from customs custody, shall be known as a "public store." Unclaimed merchandise stored in such premises shall be held under "general order." Where such premises are not sufficient or available for the storage of seized and unclaimed goods, such goods may be stored in a warehouse of class 3. If there be no warehouse of that class, the collector may, with the [580] approval of the bureau, rent suitable premises for the storage of seized and unclaimed goods.

CLASS 2. Importers' private bonded warehouses used exclusively for the storage of merchandise belonging or consigned to the proprietor thereof.

Warehouses of class 4 or 5 may be bonded exclusively for the storage of goods imported by the proprietor thereof, in which case they will be designated as "importers' private warehouses."

CLASS 3. Public bonded warehouses used exclusively for the storage of imported merchandise generally.

A warehouse of this class shall consist of an entire building, or a part of a building entirely separated from the rest of the building by suitable partitions or walls.

CLASS 4. Bonded yards or sheds for the storage of heavy and bulky imported merchandise.

Warehouses of this class shall be used exclusively for the storage of heavy and bulky articles. If the collector deems it necessary yards must be inclosed by substantial fences, with entrance gates capable of being secured by customs locks.

The collectors may send to such yards unclaimed or seized goods of a character above described.

Stables or parts thereof may be bonded upon approval of the bureau for the storage of animals.

CLASS 5. Bonded bins or parts of buildings or of elevators to be used for the storage of grain. The bonded portions must be separate from the rest of the building.

CLASS 6. Warehouses for the manufacture in bond, solely for exportation, of articles made in whole or in part of

imported materials or of materials subject to internal-revenue tax; and for the manufacture for home consumption or exportation of cigars in whole of tobacco imported from one country.

CLASS 7. Warehouses bonded for smelting and refining imported ores and crude metals for exportation or domestic consumption.

CLASS 8. Bonded warehouses established for the purpose of cleaning, sorting, repacking, or otherwise changing in condition, but not manufacturing, imported merchandise, under customs supervision and at the expense of the proprietor.

A warehouse of this class shall consist of an entire building, or a part of a building entirely separated from the rest of the building by suitable partitions or walls. [581] Warehouses of class 1 and storage warehouses of classes 2, 3, 4, 5, and 6 may be designated as "constructive manipulation warehouses" when the exigencies of the service so require.

GENERAL PROVISIONS

Art. 922. Application to bond.—(*a*) In order to establish a bonded warehouse the owner or lessee shall make application in writing to the collector, describing the premises and location and stating the class of warehouse.

(*b*) The application must be accompanied by a certificate signed by the president or secretary of a board of fire underwriters, where such board exists, and at other ports by the officers or agents of two or more insurance companies, stating that the building is a suitable warehouse, acceptable for fire-insurance purposes. T.Ds. 38547, 38637.

(*c*) After the collector has examined or caused an examination to be made of the premises he will transmit to the bureau with his recommendation the application, the insurance certificates, and a report stating the particulars relative to the location, construction, and dimensions of the build-

ing, its suitability for the storing of merchandise, whether the building is detached or adjoins other buildings, the location of doors, and all other material facts.

(*d*) The collector will also state whether or not, in his opinion, the business of the port requires the establishment of such warehouse.

Art. 923. Execution of bond.—On approval of the application to bond warehouses, classes 2, 3, 4, 5, and 8, a bond shall be executed in duplicate on customs Form 3581 in such penalty and with such security as the collector may deem proper and forwarded to the bureau for approval. When approved, one copy will be retained by the bureau and the other returned to the collector. Bonds may be executed in anticipation of approval and transmitted with the application. All storage warehouses operated by one proprietor in the same customs district may be included in one bond. The penalty on the bond shall not be less than $5,000 on each of the premises, with a maximum penalty on all premises covered by the bond of $50,000. This amount may be increased if additional security is deemed necessary. T.Ds. 24554, 38652.

[586] * * *

Art. 939. Transfer to another warehouse.—(*a*) With the concurrence of the proprietors of the delivering and receiving warehouses, merchandise may be transferred under customs supervision and at the expense of the party requesting it, from one bonded warehouse to another in the same port, on the written request of the consignee to the collector, who may issue an order for such transfer on customs Form 7500a. T.D. 35536

(*b*) All charges must be paid before goods are transferred from a warehouse of class 1.

Art. 940. Examination packages.—Merchandise sent from a bonded warehouse to the appraiser's stores for examination shall be returned by the collector to the warehouse for delivery unless the warehouseman shall indorse on

the duty-paid permit that the merchandise may be otherwise released.

Art. 941. Proprietor responsible for goods—The warehouseman is responsible for the safe-keeping of the goods stored in any bonded warehouse, and goods so stored shall be released only to or upon his order, the Government being concerned solely in the security of the revenue. T.D. 24118

Art. 942. Merchandise in bonded warehouse not subject to attachment.—(*a*) United States Code, title 28, section 747: T.Ds. 16693, 16896, 17188, 17720, 19340.

> All property taken or detained by any officer or other person, under authority of any revenue law of the United States, shall be irrepleviable, and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof. (R. S. sec. 934.)

(*b*) Merchandise in bonded warehouse is not subject to levy, attachment, or other process of a State court, and collectors can not be enjoined by State courts from releasing such merchandise in accordance with section 484 (j) of the tariff act.

(*c*) The Government will not compel a warehouseman to deliver bonded goods, as the interest of the Government is in the collection of the duty on the merchandise or its exportation, and any question of infringement of private rights by the warehouseman must be left to parties in interest. T.Ds. 16545, 19242, 19378, 19513.

[587] (*d*) Imported goods in bonded warehouse are exempt from taxation under the general laws of the several States. Low v. Austin, 13 Wallace. 20; Clarke v. Clarke, 3 Woods. 408; Blount v. Munroe, 60 Ga. 61; State v. Pinckney, 10 Rich. L. 474. T.D. 21158

STORAGE—MANIPULATION WAREHOUSES

Art. 943. Manipulation in bond authorized.—Tariff act of 1930, section 562:

> * * * Upon permission therefor being granted by the Secretary of the Treasury, [Commissioner of Customs]

and under customs supervision, at the expense of the proprietor, merchandise may be cleaned, sorted, repacked, or otherwise changed in condition, but not manufactured, in bonded warehouses established for that purpose and be withdrawn therefrom for exportation to a foreign country or for shipment to the Virgin Islands, American Samoa, or the island of Guam, without payment of the duties, or for consumption, upon payment of the duties accruing thereon, in its condition and quantity, and at its weight, at the time of withdrawal from warehouse, with such additions to or deductions from the final appraised value as may be necessary by reason of change in condition. The basis for the assessment of duties on such merchandise so withdrawn for consumption shall be the entered value or the adjusted final appraised value, whichever is higher, and if the rate of duty is based upon or regulated in any manner by the value of the merchandise such rate shall be based upon or regulated by such adjusted final appraised value; but for the purpose of the ascertainment and assessment of additional duties under section 489 of this Act adjustments of the final appraised value shall be disregarded. The scouring or carbonizing of wool shall not be considered a process of manufacture within the provisions of this section.

Art. 944. Entry.—(*a*) Merchandise to be manipulated under section 562, may be entered on customs Form 7502 and sent direct to a storage-manipulation warehouse.

(*b*) Merchandise entered for warehouse may be transferred therefrom to a storage-manipulation warehouse; or merchandise entered for storage-manipulation warehouse may be transferred therefrom, after manipulation, to the storage portion of the same warehouse, to another storage warehouse, or to a manufacturing warehouse of class 6.

Art. 945. Manipulation.—(*a*) Application to manipulate should be made in duplicate on customs Form 3499 to the

collector of customs having jurisdiction of the manipulation warehouse. When satisfied that the contemplated manipulation comes within the provisions of section 562, the collector may issue a permit (customs Form 3499), making any necessary modifications in such form.

[593] * * *

Art. 959. Transfer of domestic spirits.—For the transfer of domestic spirits from an internal-revenue bonded warehouse to a bonded manufacturing warehouse, see Internal Revenue Regulations 29, of January 1, 1909, as amended August 18, 1914, and Bureau of Industrial Alcohol Regulations No. 2. When such transfer is made, a bond on Customs Form 7571 will be required. T.D. 38750.

Art. 960. Withdrawal for exportation of articles manufactured in bond.—(*a*) Tariff act of 1930, section 311:

> Articles or materials received into such bonded manufacturing warehouse or articles manufactured therefrom may be withdrawn or removed therefrom for direct shipment and exportation or for transportation and immediate exportation in bond to foreign countries or to the Phillippine Islands under the supervision of the officer duly designated therefor by the collector of the port, who shall certify to such shipment and exportation, or ladening for transportation, as the case may be, describing the articles by their mark or otherwise, the quantity, the date of exportation, and the name of the vessel: *Provided,* That the by-products incident to the processes of manufacture, including waste derived from cleaning rice in bonded warehouses under the act of March 24, 1874, in said bonded warehouses may be withdrawn for domestic consumption on the payment of duty equal to the duty which would be assessed and collected by law if such waste or by-products were imported from a foreign country: *Provided,* That all waste material may be destroyed under Government supervision. All labor performed and services rendered

under these provisions shall be under the supervision of a duly designated officer of the customs and at the expense of the manufacturer. * * *

No flour, manufactured in a bonded manufacturing warehouse from wheat imported after ninety days after the date of the enactment of this act, shall be withdrawn from such warehouse for exportation without payment of a duty on such imported wheat equal to any reduction in duty which by treaty will apply in respect of such flour in the country to which it is to be exported. * * *

(*b*) Except cigars manufactured in bond, and supplies for vessels, no articles or materials received into a bonded manufacturing warehouse or articles manufactured therefrom, [594] shall be withdrawn or removed therefrom, except for direct shipment and exportation or for transportation and immediate exportation in bond to foreign countries, or to the Philippine Islands, under the supervision of a customs officer.

(*c*) The coverings of imported articles or materials, if not subject to duty or internal-revenue tax apart from the articles or materials which they contain, are not "articles or materials" within the meaning of section 311, and need not be exported, but may be removed from the warehouse under customs supervision. T.D. 15364

(*d*) Coverings, packages,and vessels imported empty to be used in putting up the manufactured articles and brands and labels imported for that purpose, if subject to duty or internal-revenue tax, constitute "articles or materials" within the meaning of section 311 and, unless duty paid or tax paid, as the case may be, at the time of entry, must be exported.

Art. 961. Withdrawal of waste or by-products for consumption.—When waste or by-products are withdrawn for consumption, customs Form 7505 shall be used, modi- T.Ds. 30458 30516.

fied as necessary, and describing in detail the by-product and the imported material from which produced. Such waste or by-product shall be appraised at its wholesale value at the time of withdrawal in the principal markets of the country from which the material was imported, determined in accordance with the provisions of section 402 of the tariff act of 1930. Upon payment of the duty the withdrawal permit will be issued for delivery and a proper credit given upon the manufacturer's bond.

Art. 962. Export procedure—(*a*) The general procedure covering warehouse withdrawals for exportation shall be followed in the case of articles withdrawn for exportation from a bonded manufacturing warehouse, except that in the case of flour each copy of customs Form 7512 shall bear the following legend:

> "Produced from wheat imported after September 15, 1930, without payment of duty thereon. Must not be exported to Cuba without permission from the collector at the port of withdrawal."

* * *

U. S. TREASURY DEPARTMENT

BUREAU OF CUSTOMS

CUSTOMS REGULATIONS

OF THE

UNITED STATES

Prescribed for the Instruction and Guidance
of Customs Officers

EDITION OF 1937

[SEAL]

United States
Government Printing Office
Washington: 1937

ORDER OF PUBLICATION

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C.

The following regulations are published for the instruction and guidance of all officers and employees of the customs.

This volume is to be known and cited as the Customs Regulations of 1937, and supersedes the Customs Regulations of 1931, as amended and all other prior regulations in conflict with the regulations in this volume or the substance of which is incorporated herein.

References to these regulations in official correspondence are to be made to the article numbers and not to the chapters or pages.

Collectors and other chief officers of the customs are directed to require all officers and employers under their jurisdiction to familiarize themselves with the regulations, and particularly with those portions thereof pertaining to the specific duties to which such officers and employees are assigned.

These regulations are to be strictly observed and followed by all customs officers and employees unless compliance therewith be expressly waived in writing.

(Signed) FRANK DOW,
Acting Commissioner of Customs

Approved August 20, 1937.
(Signed) STEPHEN B. GIBBONS,
Acting Secretary of the Treasury

Filed with the Division of Federal Register August 23, 1937.

[286] * * *

VESSELS—WITHDRAWAL OF SUPPLIES FOR

Art. 464. Exemption from customs duties and internal-revenue tax.—(*a*) Tariff Act of 1930, section 309 (a):

T.Ds. 9776, 9787, 18379, 18922, 23237 38535, 44477, 46522.

> Sec. 309. *Supplies for certain vessels.*—(a) Articles of foreign or domestic manufacture or production may, under such regulations as the Secretary of the Treasury may prescribe, be withdrawn from bonded warehouses or bonded manufacturing warehouses free of duty or internal-revenue tax for supplies (not including equipment) of vessels of war, in ports of the United States, of any nation which may reciprocate such privilege toward the vessels of war of the United States in its ports, or for supplies (not including equipment) of vessels of the United States employed in the fisheries or in the whaling business, or actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or between the United States and any of its possessions, but no such article shall be landed at any port or place in the United States or in any of its possessions.

(*b*) Section 309 (a) of the Tariff Act of 1930, and the regulations promulgated thereunder, insofar as applicable, shall apply to civil aircraft actually engaged in trade with noncontiguous foreign countries and to civil aircraft actually engaged in trade between the United States and any of its possessions.

T.D. 46243, U. S. C. Title 49 sec. 177 (b). Tariff Act of 1930, sec. 644.

(*c*) A vessel is not considered to be actually engaged in the foreign trade, or in trade between the Atlantic and Pacific ports of the United States, or between the United States and its possessions, as the case may be, unless it is—

T.D. 48788.

(1) Operating on a regular schedule in a class of trade which entitles it to the privilege;

(2) Actually transporting passengers or merchandise to or from a foreign port, a port on the opposite coast of the

United States, or between a port in a possession of the United States and a port in the United States or in another of its possessions;

(3) Documented for foreign trade, is proceeding in ballast to another domestic port to lade passengers or cargo for a foreign port, and its last carriage of passengers or cargo prior to departure from the port of withdrawal was not exclusively between ports in the same great district; or

[287] (4) Departing in ballast from the port at which the withdrawal is made directly for a foreign port, a port on the opposite coast of the United States, a port in one of the possessions of the United States, or, where the port of withdrawal is in a possession of the United States, departing directly for a port in the United States or in another of its possessions.

T.D. 44500

Art. 465. United States Government vessels—Foreign war vessels.—(*a*) As United States war vessels, transports, and vessels belonging to the United States engaged exclusively in the transportation of Government property, are not engaged in trade, they are excluded from the privilege of withdrawing supplies free of duty under section 309 (a).

(*b*) The privilege may be accorded to vessels of war of the following countries: Argentina, Austria, Brazil, Chile, Denmark, England, France, Germany, Greece, Holland, Italy, Japan, Korea, Norway, Rumania, Salvador, Siam, Sweden, and Venezuela.

T.D. 46522
47630-B,
45495, 45788.

Art. 466. Form of withdrawal—Bond.—(*a*) Withdrawals shall be made on customs Form 7506.

(*b*) If the withdrawal is made by other than the principal on the warehouse or rewarehouse entry, as the case may be, the assent of such principal shall be indorsed on the withdrawal, unless the principal has, in writing, otherwise authorized such withdrawal.

(*c*) A bond on customs Form 7501 shall be taken when the withdrawal is made by a person other than the principal on the warehouse or rewarehouse entry, as the case may be, except where the vessel departs from the port of withdrawal directly for a foreign port.

(*d*) When the merchandise is not to be laden at the port of withdrawal it must be withdrawn for transportation in bond to the port of lading. Three copies of manifest, customs Form 7512, in addition to six copies of the withdrawal on customs Form 7500 will be required. The procedure will be the same as that prescribed in article 900 (*b*) (the six copies of customs Form 7500 taking the place of the entry copies of customs Form 7512), except that no shipper's export declaration, customs Form 7525, will be required.

(*e*) No bond shall be required in the case of war vessels.

Art. 467. Delivery permit—Lading.—(*a*) Upon the filing of the withdrawal and the execution of the bond, when required, the collector shall issue a permit on customs Form 7500-A.

(*b*) A copy of the withdrawal will be transmitted to the surveyor or inspector acting as such, who shall designate a customs officer to supervise the lading of the merchandise and make a return thereof.

(*c*) Except where the vessel departs from the port at which the withdrawal is made direct for a foreign port, the merchandise shall be entered on the store list of the vessel on which laden, which fact shall be certified by the marine clerk or officer acting as such on the withdrawal. T.D. 40724, 48783.

Art. 468. Intermediate ports.—A copy of the store list, when required, showing the articles withdrawn and taken on board shall be made on or attached to the manifest accompanying the vessel at the time of departure from the port of withdrawal. [288] When the vessel touches at an intermediate port in the United States, the collector at such port shall T.D. 45738.

notify the collector at the port of withdrawal if any portion of the supplies is landed at the intermediate port, in order that duty may be collected under the bond.

Art. 469. Vessels diverted after clearance.—When a vessel which has taken on board supplies free of duty is withdrawn from trade, or is diverted to a class of trade not entitled to the privilege, the parties in interest shall immediately notify the collector at the port of withdrawal, who shall credit the bond with only such portion of the supplies used while the vessel was in a proper class of trade, and collect duty on the balance. Whenever any such diversion comes to the attention of a collector of customs at any port in the United States, he shall likewise notify the collector at the port of withdrawal. T.Ds. 46522, 48755.

Art. 470. Cancelation of bonds.—An affidavit of the master or other officer of the vessel having knowledge of the facts, showing that such supplies have been used on board the vessel and no portion thereof landed within the limits of the United States or any of its possessions, must be produced within six months from the date of the withdrawal to cancel the bond provided for in article 466 (*c*). The six-months' period may be extended as provided in article 1269. Such an affidavit must likewise be produced when the withdrawal is made by the principal on the warehouse or rewarehouse entry bond to secure credit on such bond for the free withdrawal, except where the vessel departs from the port of withdrawal directly for a foreign port. T.D. 48495, 48755, 48964.

Art. 471. Tobacco products.—(*a*) Tariff Act of 1930, section 317:

> The shipment or delivery of manufactured tobacco, snuff, cigars, or cigarettes, for consumption beyond the jurisdiction of the internal-revenue laws of the United States, as defined by section 3448 of the Revised Statutes, shall be deemed exportation within the meaning of the customs and internal-revenue laws applicable to the exportations of such articles without payment of duty or internal-revenue tax.

(*b*) As provided in section 3448 R. S. (U. S. Code title 26, sec. 897), the jurisdiction of the internal-revenue laws extends to all territory within the exterior boundaries of the United States; that is, within the 3-mile limit.

(*c*) Imported manufactured tobacco, snuff, cigars, and cigarettes in bonded warehouse or otherwise in customs custody, and such articles manufactured with the use of imported materials in a bonded manufacturing warehouse of class 6, may be withdrawn under section 317 for consumption beyond the 3-mile limit or international boundary, as the case may be, on vessels, whether foreign or domestic, actually engaged in the foreign trade, or operating on a regular schedule in trade between one great district of the United States and another great district thereof, or between the United States and the Philippine Islands, the Virgin Islands, American Samoa or the island of Guam, or actually clearing for such places or on vessels of war or other governmental activity, including vessels belonging to the United States, in, or en route to, places outside the jurisdiction of the internal-revenue laws.

* * *

[530] CLASSES OF CUSTOMS WAREHOUSES

T.D. 45465.

Art. 919. Public stores and bonded warehouses—Classes 1 to 8.—CLASS 1. Premises owned or leased by the Government and used for the storage of merchandise undergoing examination by the appraiser, under seizure or pending final release from customs custody, shall be known as a "public store." Unclaimed merchandise stored in such premises shall be held under "general order." Where such premises are not sufficient or available for the storage of seized and unclaimed goods, such goods may be stored in a warehouse of class 3, 4 or 5. So far as such warehouses are used for this purpose, they shall be designated "bonded stores." If there be no warehouses of these classes, the collector may, with the approval of the Bureau, rent suitable premises for the storage of seized and unclaimed goods.

CLASS 2. Importers' private bonded warehouses used exclusively for the storage of merchandise belonging or consigned to the proprietor thereof.

Warehouses of class 4 or 5 may be bonded exclusively for the storage of goods imported by the proprietor thereof, in which case they will be designated as "importers' private warehouses."

CLASS 3. Public bonded warehouses used exclusively for the storage of imported merchandise generally.

A warehouse of this class shall consist of an entire building, or a part of a building entirely separated from the rest of the building by suitable partitions or walls.

CLASS 4. Bonded yards or sheds for the storage of heavy and bulky imported merchandise.

Warehouses of this class shall be used exclusively for the storage of heavy and bulky articles. If the collector deems it necessary yards must be inclosed by substantial fences, with entrance gates capable of being secured by customs locks.

The collectors may send to such yards unclaimed or seized goods of a character above described.

Stables or parts thereof may be bonded upon approval of the Bureau for the storage of animals.

CLASS 5. Bonded bins or parts of buildings or of elevators to be used for the storage of grain. The bonded portions must be separate from the rest of the building.

CLASS 6. Warehouses for the manufacture in bond, solely for exportation, of articles made in whole or in part of imported materials or of materials subject to internal-revenue tax; and for the manufacture for home consumption or exportation of cigars in whole of tobacco imported from one country.

CLASS 7. Warehouses bonded for smelting and refining imported ores and crude metals for exportation or domestic consumption.

CLASS 8. Bonded warehouses established for the purpose of cleaning, sorting, repacking, or otherwise changing in condition, but not manufacturing, imported merchandise, under customs supervision and at the expense of the proprietor.

A warehouse of this class shall consist of an entire building, or a part of a building entirely separated from the rest of the building by suitable partitions or walls. Warehouses of class [531] 1 and storage warehouses of classes 2, 3, 4, 5, and 6 may be designated as "constructive manipulation warehouses" when the exigencies of the service so require.

GENERAL PROVISIONS

Art. 920. Application to bond.—(*a*) In order to establish a bonded warehouse the owner or lessee shall make application in writing to the collector, describing the premises and location and stating the class of warehouse.

(*b*) The application must be accompanied by a certificate signed by the president or secretary of a board of fire underwriters, where such board exists, and at other ports by the officers or agents of two or more insurance companies, stating that the building is a suitable warehouse, acceptable for fire-insurance purposes. T.Ds. 38547, 88037.

(*c*) After the collector has examined or caused an examination to be made of the premises he will transmit to the Bureau with his recommendation the application, the insurance certificates, and a report stating the particulars relative to the location, construction, and dimensions of the building, its suitability for the storing of merchandise, whether the building is detached or adjoins other buildings, the location of doors, and all other material facts. The application, together with all reports, documents, and drawings filed in connection therewith, shall be transmitted to the Bureau in duplicate.

(*d*) The collector will also state whether or not, in his opinion, the business of the port requires the establishment of such warehouse.

Art. 921. Execution of bond.—On approval of the application to bond warehouses, classes 2, 3, 4, 5, and 8, a bond shall be executed in duplicate on customs Form 3581 in such penalty and with such security as the collector may deem proper and forwarded to the Bureau for approval. When approved, one copy will be retained by the Bureau and the other returned to the collector. Bonds may be executed in anticipation of approval and transmitted with the application. All storage warehouses operated by one proprietor in the same customs district may be included in one bond. The penalty on the bond shall not be less than $5,000 on each of the premises, with a maximum penalty on all premises covered by the bond of $50,000. This amount may be increased if additional security is deemed necessary. Collectors must see that the bond is in proper form and that instructions printed thereon are observed. T.Ds. 24554, 38652.

Art. 922. Bond—Renewal of.—The proprietors or occupants of bonded warehouses may be required on 10 days' notice from the collector to renew their bonds; and if they fail so to do, no more goods shall be sent to their warehouses, and those therein shall be removed at their expense.

Art. 923. New bond—When necessary.—(*a*) The collector will promptly notify the Commissioner of Customs of the death, pecuniary embarrassment, insolvency, or change of status of any of the parties to the bond, or of any circumstances which require a new bond.

* * *

[535] Art. 936. Examination of goods by importer—Sampling—Repacking.—Importers may, upon application approved by the collector on customs Form 3400, and under the supervision of the storekeeper, examine, sample, and for safety or preservation only, repack or transfer, merchandise in bonded warehouse. Tariff Act 1930, secs. 557, 562. T.D. 46325.

Art. 937. Transfer to another warehouse.—(*a*) With the concurrence of the proprietors of the delivering and receiving warehouses, merchandise may be transferred under cus- T.D. 35536.

toms supervision and at the expense of the party requesting it, from one bonded warehouse to another in the same port, on the written request of the consignee to the collector, who may issue an order for such transfer on customs Form 7500-A.

(*b*) All charges must be paid before goods are transferred from a warehouse of class 1.

Art. 938. Examination packages.—Merchandise sent from a bonded warehouse to the appraiser's stores for examination shall be returned by the collector to the warehouse for delivery unless the warehouseman shall indorse on the duty-paid permit that the merchandise may be otherwise released.

Art. 939. Proprietor responsible for goods.—The warehouseman is responsible for the safe-keeping of the goods stored in any bonded warehouse, and goods so stored shall be released only to or upon his order, the Government being concerned solely in the security of the revenue. T.D. 24118

Art. 940. Merchandise in bonded warehouse not subject to attachment.—(*a*) United States Code, title 28, section 747: T.D. 16693, 16896, 17188, 17720, 19340.

> All property taken or detained by any officer or other person, under authority of any revenue law of the United States, shall be irrepleviable, and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof. (R. S., sec. 934.)

(*b*) Merchandise in bonded warehouse is not subject to levy, attachment, or other process of a State court, and collectors can not be enjoined by State courts from releasing such merchandise in accordance with section 484 (j) of the tariff act.

(*c*) The Government will not compel a warehouseman to deliver bonded goods, as the interest of the Government is in the collection of the duty on the merchandise or its exportation, and any question of infringement of private rights by the warehouseman must be left to parties in interest.

T.D. 16545, 19242, 19378, 19513.

(*d*) Imported goods in bonded warehouse are exempt from taxation under the general laws of the several States.

Low v. Austin, 13 Wallace. 29; Clarke v. Clarke, 3 Woods. 408; Blount v. Munroe, 60 Ga. 61; State v. Pinckney, 10 Rich. L. 474. T.D. 21158.

* * *

CALENDAR NO. 65

73D CONGRESS, *1st Session*
SENATE REPORT NO. 58

AMENDMENTS TO THE REVENUE ACT OF 1932

MAY 1 (calendar day, MAY 10), 1933—Ordered to be printed.

MR. HARRISON, from the Committee on Finance, submitted the following

REPORT

[To accompany H.R. 5040]

The Committee on Finance, to whom was referred the bill (H.R. 5040) to extend the gasoline tax for 1 year, to modify postage rates on mail matter, and for other purposes, having considered the same, report favorably thereon with a recommendation that it do pass with certain amendments.

The first section of the bill strikes out that part of section 629 of the Revenue Act of 1932 which limits the application of the gasoline tax to the period ending June 30, 1933. The effect of the section is thus to make the gasoline tax effective for the period ending June 30, 1934, or for 1 additional year. It is estimated that this extension will increase the revenue by approximately $135,000,000. Your committee is of the opinion that the gasoline tax should be reserved for the States after June 30, 1934.

The second section gives the President authority to change the rate of postage on any mail matter, except the rate fixed by law on first-class matter mailed for local delivery, postal cards, and private mailing or post cards. The authority granted to the President by section 2 is of a temporary character, expiring on June 30, 1934, and any change in rates made by him will not be effective after that date. The modifications in rates shall be

such as the President may deem advisable after a survey, by reason of increase in business, the interests of the public, or the needs of the Postal Service. In no case may the rate be reduced below 2 cents per ounce or fraction thereof on first-class matter. The increase in rates made by the Revenue Act of 1932 from 2 to 3 cents on nonlocal first-class mail matter has been disappointing from a revenue standpoint, due to the decrease in this volume of mail. A survey by the President may ultimately show that a lower rate will restore much of this matter to the mails, and thus have a beneficial effect upon the revenue.

Section 3 (a) amends section 1001 (a) of the Revenue Act of 1932. The effect is to reduce, after June 30, 1933, the postage rate from 3 cents to 2 cents per ounce or fraction thereof on first-class mail matter for local delivery at post offices having city or village letter carrier service, or at any post office for local delivery on a rural route therefrom, or on a rural route for local delivery at the post office or on another rural route therefrom. Experience has shown that the 3-cent rate has resulted in the withdrawal from the mails of a considerable quantity of first-class matter for local delivery, with a resulting loss in revenue. It is believed that the reduced rate will result in restoring much of this matter to the mails and, on account of the increased volume, will eventually add materially to the revenue. It is expected that the effect of this reduction in rate will serve as a guide to the President in determining any action he may take under section 2. The only amendment to this section of the House bill recommended by your committee is of a minor character consisting of striking out the words "for experimental purposes,".

[2] Section 3 (b) amends section 1001 (c) of the Revenue Act of 1932. This is made necessary by the change made by section 3 (a). Since the class of post offices, as well as the compensation and allowances of postmasters and postal employees of such post offices as have city or village letter-carrier service, is based upon the percentage of the gross postal receipts from such post offices, this percentage has been increased to conform with the reduction in the postal rate. The purpose is to

prevent as far as possible the reclassification of post offices or changes in the compensation and allowances of postmasters and postal employees.

Section 4 (a) amends section 620 of the Revenue Act of 1932. Under existing law a manufacturer may sell tax free to a State or political subdivision, but sales to a dealer are subject to tax, even though the dealer purchases the articles for resale to a State or political subdivision. This discrimination results in a loss of business to the dealers, who are unable to compete with manufacturers for State business, and does not add any substantial gain in revenue to the Federal Government. The bill gives a tax exemption in the case of sales to a dealer when it is known that the articles are to be resold to a State or political subdivision. To safeguard the revenue the exemption is conditioned upon subsequent proof that the articles are actually so resold.

Dealers in articles for further manufacture are placed at a similar disadvantage. Under existing law, manufacturers may sell articles for further manufacture tax free when the sale is direct to another manufacturer and not when the articles pass through the hands of a dealer. The bill rectifies this situation in the same manner as in the case of articles to be resold to a State or political subdivision.

Section 4 (b) amends section 601 (c) (1) of the Revenue Act of 1932. Under existing law, a lubricating-oil manufacturer who sells oil to another manufacturer must pay the tax unless the oil is intended for further manufacture, in which case the vendee assumes responsibility for the tax. Under the bill, one manufacturer may sell tax free to another for resale and the vendee will pay the tax on his resale. Thus lubricating-oil manufacturers are placed upon the same basis as producers of gasoline, who have this privilege under existing [3] law. Since mere blenders are not regarded as manufacturers or producers of lubricating oil, the tax-free sales are confined to responsible concerns, without any apparent danger to the revenue.

Section 4 (c) amends section 621 (a) of the Revenue Act of 1932. The effect is to provide relief (by way of credit or refund) for dealers who sell to State or political subdivisions

thereof taxable articles which they have not purchased tax free under section 620 as amended by section 4 (a) of the bill.

Your committee has inserted a new section 5 providing for exemption from the manufacturers' excise taxes under the Revenue Act of 1932 of articles sold for use as supplies or equipment on vessels of war, vessels employed in the fisheries or whaling business, or actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or between the United States and any of its possessions. It is believed that this amendment will enable American manufacturers to compete more favorably with their foreign competitors for this business without any substantial loss of revenue since the effect of the present law is to force purchases abroad. The bill also provides for allowance of drawback on articles manufactured or produced with the use of merchandise on the importation of which tax has been paid under the Revenue Act of 1932, when such articles are laden for use as supplies on vessels of the classes enumerated. This also relieves American manufacturers from a competitive disadvantage.

The House bill transfers the tax on electrical energy furnished for domestic or commercial consumption from the consumer to the vendor. Your committee has rewritten this part of the bill. It is agreed that this tax should be transferred to the vendor, but that the rate should be reduced from 3 percent to 2 percent on account of the hardship which the higher rate might impose on nonprofitable companies. In order to give the companies an opportunity to obtain rate adjustments, where justifiable, the transfer of the tax from the consumer to the vendor is not made effective until September 1, 1933. In order to offset the loss in revenue caused by this rate reduction, a 1-percent tax is imposed upon consumers of electrical energy for purposes other than domestic or commercial. This tax applies only to electrical energy furnished on or after September 1, 1933, and before July 1, 1934. The electrical energy taxes recommended broaden the tax base and, it is believed, will produce almost as much revenue as the tax under existing law.

77 CONGRESSIONAL RECORD—PART III, 3212-3214

EXTENSION OF GASOLINE TAX

Mr. HARRISON. I move that the Senate proceed to the consideration of House bill 5040.

The VICE PRESIDENT. The question is on the motion of the Senator from Mississippi.

The motion was agreed to; and the Senate proceeded to consider the bill (H.R. 5040) to extend the gasoline tax for 1 year, to modify postage rates on mail matter, and for other purposes, which had been reported from the Committee on Finance, with amendments.

Mr. HARRISON. Mr. President, I desire to make a brief explanation of the bill now pending before the Senate. I trust that Senators who desire to listen to the explanation will withhold any questions until I shall have concluded my explanation, and then, if I can do so, I shall be glad to explain further any parts of it that may be desired.

It will be noted that the first part of the bill pertains to the gasoline tax which was imposed in the 1932 act at the rate of 1 cent per gallon. That tax would expire on June 30, 1933. The committee provides in the first section of the bill an extension of that tax for another year. It is to be hoped that by that time the Federal Government can withdraw from participation in the tax on gasoline.

Section 2 of the bill deals with changes in the postal laws. It fixes the rate on drop letters for the fiscal year 1934 and provides that the present rate of 3 cents shall be reduced to 2 cents. That is not optional with the President. That is fixed by the mandate of the Congress.

As to other powers that are granted in that section of the bill, the President is given authority, after survey and investigation, either to reduce or to increase postal rates, having in view economies and a balancing of postal receipts and disbursements. There are only two limitations upon those powers. One is that he may not fix a rate below 2 cents on first-class mail

matter and the other is that the 2-cent rate as fixed shall apply to drop letters.

As to the other provisions of the bill, it was found in the application of the gasoline tax of 1932 that certain dealers were discriminated against and that sometimes a tax was unjustifiably imposed upon them. Upon recommendation of the Treasury Department we have cured such defects in the act. We made the tax applicable to all those things embodied in the manufacturer's so-called "limited sales tax." For instance, where a dealer buys from a manufacturer and the tax is passed on from the manufacturer to the dealer, the dealer will not now have to pay the tax where he sells the gasoline to another manufacturer, but the second manufacturer will pay it. I would not have Senators get the impression that there are two taxes to be imposed. It is only imposed in the last instance.

The bill changes also the application of the tax so that political subdivisions, States, counties, highway commissions, and so forth, are made exempt from the payment of the 1-cent gasoline tax. It was found in certain cases that a manufacturer had sold gasoline to a dealer, and when the dealer had sold it to some political subdivision, a State or county, or municipality, they had paid the tax and there was no recourse for the political subdivision to obtain a refund. We have incorporated in the bill a provision that enables the dealer, where the tax has been passed on to him and he sells the gasoline to a political subdivision of a State, to apply for and obtain a refund of such tax.

These are the administrative changes recommended in order to eliminate any discrimination in collecting the tax. There is another provision incorporated in the bill that affects lubricating oil, which is put in the same classification as gasoline in the matter of the elimination of the discriminatory provisions of the law in the collection of the tax.

There is also a provision that deals with fuel oils and ship's stores and sea stores. It was found that many of the vessels which carry on the foreign trade heretofore had bought their fuel oil in this country, but since the passage of the tax act they have changed their practice and are filling their tanks abroad in

the ports of foreign countries, and we are losing that trade. A provision is recommended by the committee that in the case of fuel oil, ship's stores, and so forth, as involved in this class of foreign trade, the tax shall not be imposed. It will be seen from a reading of the bill that it does not apply to coastwise vessels at all, but only to those engaged in foreign trade.

Mr. President, the last provision of the bill deals with the electric-energy tax. It will be recalled that when the bill was before the House to extend the gasoline tax for another year an amendment was offered upon the floor of the House and was adopted by a very large vote, changing the method of taxing electric energy. I am telling Senators nothing new when I remind them that we had a fight here in 1932 over the imposition of this tax. The Senate imposed a [3213] 3-percent electric-energy tax, and it was finally adopted, to be collected from the consumer of electric energy. We applied that only on domestic and commercial energy; that is, electric energy used in stores and dwellings that are classified as commercial and domestic. There was no tax in the 1932 act imposed upon energy employed in industry.

The House adopted an amendment that took the payment of the 3-percent tax from the consumer and placed it upon the power companies, or at the source, so to speak. The committee had a great deal of discussion over that amendment. It was a very difficult problem to solve because many power companies appeared before us by their representatives and said they would be put out of business if such a provision were incorporated in the bill. A subcommittee was appointed to study the matter and report. The subcommittee reported to the full committee and we discussed it several days and finally have adopted and recommended to the Senate a provision for a tax of 2 percent on commercial and domestic energy, to be collected at the source from the power companies, reducing the House proposal in that respect from 3 percent to 2 percent. Then we have recommended an industrial electric-energy tax of 1 percent to be collected from the consumer. The Treasury estimates that there will be very little loss, if any, in revenue from the adoption of this procedure. We felt that such a provision was fair.

Again, we approve and recommend an amendment which makes the tax operative on September 1 of this year. The new tax will go into effect at that time. It was believed by the Committee on Finance, in the case of some of the smaller companies which said they would be driven out of business by virtue of a 2-percent tax upon them, that it should be provided that they might appear before the public service commission of their respective States and let the commission pass upon the question of whether the tax should be passed on to the consumer. The law will not go into effect, under the recommendations of the committee, until September 1.

That is a brief explanation of what the bill contains; and I shall now be very glad to answer any question any Senator may desire to propound.

Mr. BORAH. Mr. President—

The VICE PRESIDENT. Does the Senator from Mississippi yield to the Senator from Idaho?

Mr. HARRISON. Certainly.

Mr. BORAH. As I understand, the tax on electric energy will not go into effect until September 1?

Mr. HARRISON. Yes.

Mr. BORAH. In the meantime the companies may apply to the State commission to have that tax transmitted to the consumer?

Mr. HARRISON. Yes; or for an increase in their rates, as they may be advised.

Mr. BORAH. What changes were made in the House text with reference to that provision?

Mr. HARRISON The House bill put a 3-percent tax on commercial and domestic energy, payable by the power companies and to take effect at once. The change has been made as I have previously pointed out.

Mr. ROBINSON of Indiana. Mr. President—

The VICE PRESIDENT. Does the Senator from Mississippi yield to the Senator from Indiana?

Mr. HARRISON. Certainly.

Mr. ROBINSON of Indiana. As I remember it, last year, when this question was before the Senate, the Senate voted to impose

a 3-percent tax on electric energy and charge it to the producer and not to the consumer. Then the matter went to conference and the Senate conferees, in spite of what the Senate had done, agreed to let the consumer pay it. I presume they felt that they had reason for doing that, although the responsibility was finally laid at the door of some member of the House, and so the tax was to be charged to the consumer. Some of us believed then that it should have been charged to the power companies. A large majority of the Senate believed that. Evidently the House has rectified that provision to a certain extent and now proposes to charge the tax to the producer.

I understand the Senator to say that the Senate Committee on Finance has reduced the 3 percent to 2 percent?

Mr. HARRISON. On commercial and domestic energy.

Mr. ROBINSON of Indiana. And the charge will now be levied against the producer rather than the consumer?

Mr. HARRISON. That is true.

Mr. ROBINSON of Indiana. One percent will be charged the consumer of industrial energy?

Mr. HARRISON. Yes. In that connection may I say that there was no tax on industrial energy in the 1932 act?

Mr. ROBINSON of Indiana. There was none?

Mr. HARRISON. No; there was none.

Mr. ROBINSON of Indiana. I am asking the Senator for information because I know he is very familiar with the subject. I have had a number of inquiries with reference to a 1-percent tax to be assessed against electric railways. Does the Senator call that industrial energy?

Mr. HARRISON. Yes; I think that is industrial energy.

Mr. FESS. Mr. President—

The VICE PRESIDENT. Does the Senator from Mississippi yield to the Senator from Ohio?

Mr. HARRISON. I yield.

Mr. FESS. I did not get the purport of the delegation of power to the President with reference to postal rates. Does that cover second-, third-, and fourth-class rates?

Mr. HARRISON. That is covered by section 2 of the bill.

Mr. FESS. Does it extend to all classes of mail matter except first class?

Mr. HARRISON. To all classes of mail. He had the power during the fiscal year 1932 to increase or reduce, with the limitations which I pointed out.

Mr. FESS. The rates put into effect would cease at the end of the fiscal year 1934?

Mr. HARRISON. The law would expire on June 30, 1934.

Mr. BORAH. Mr. President, going back to the question of the tax on electric energy—

Mr. HARRISON. Did the Senator from Ohio want to ask another question?

Mr. FESS. I will wait until the Senator from Idaho concludes. He may ask the question which I have in mind.

Mr. BORAH. As I understand, the bill provides that the entire tax on electric energy may be charged to the consumer?

Mr. HARRISON. No.

Mr. BORAH. Why not?

Mr. HARRISON. I say it may not. After the law goes into effect, before the 1st of September, and even after the 1st of September, if some power company should apply in the Senator's State or in my State to the public service commission, and that commission thinks it should be passed on to the consumer, they would have the power to order or permit that to be done.

Mr. ROBINSON of Arkansas. Mr. President, may I ask the Senator a question? The proposed legislation does not deal with that subject at all?

Mr. HARRISON. Not at all.

Mr. ROBINSON of Arkansas. It imposes the tax of 2 percent on the power companies.

Mr. HARRISON. Yes.

Mr. BORAH. I understand that; and then it postpones the time of operation in order to give the power companies an opportunity to be heard before the Commission as to passing it on.

Mr. HARRISON. That was the reason for fixing the date as September 1, may I say.

Mr. FESS. Is any power given to the President here to increase the rate of the gasoline tax?

Mr. HARRISON. None at all; oh, no. We just extend the present 1-cent gasoline tax for another year. That is all that is done with that matter, except that we have cured some of the discriminatory provisions, as I pointed out to the Senator. [3214]

Mr. FESS. Then the impressioin that we are continuing the 3-percent tax is incorrect; it is reduced from 3 to 2 percent on domestic use and 1 percent on industrial use?

Mr. HARRISON. We are reducing the tax on commercial and industrial energy from 3 percent to 2 percent and putting it upon the power company.

Mr. FESS. And adding 1 percent—

Mr. HARRISON. And adding 1 percent on industrial energy, to be collected from the user or consumer.

Mr. WHITE. Mr. President, will the Senator recur to section 630? That section relates to a tax imposed upon fuel supplies, ships' stores, sea stores, and so-forth, and provides that this tax shall not be collected on such stores used on war vessels either of the United States or of a foreign country. That is right; is it not?

Mr. HARRISON. Yes.

Mr. WHITE. Then it goes on and refers to these stores and supplies used upon vessels employed in the fisheries or in the whaling business, and so forth. I take it this exempts from the tax only those stores used on American ships.

Mr. HARRISON. The Senator from Pennsylvania [Mr. Reed] offered this amendment, and I should like to hear his interpretation of that.

Mr. REED. Mr. President, the idea is this:

At the present time, ships under the American flag or foreign flags, engaged in the various services mentioned here, all have opportunity to buy their fuel oil at foreign ports, and since we have put a tax on that oil they have all been doing it. At the present time we are not getting any revenue out of vessels engaged in these services. We will not get any revenue out of them if this section passes; but Americans will get the business of selling to them, which at present is prevented by the imposition of the tax.

Mr. WHITE. To repeat my question, are foreign vessels employed in the fisheries or in the whaling business exempted from the tax on the use of these articles?

Mr. REED. I think they would be, and they ought to be, because at present they are buying their supplies abroad; and not only do we get no tax, but American suppliers do not get any of the business.

Mr. WHITE. Of course there are no foreign vessels engaged in trade between the Atlantic and Pacific ports of the United States.

Mr. REED. That is true.

Mr. WHITE. The inclusion of that clause led me to believe that perhaps this second portion applied only to American ships.

Mr. REED. No; I should not so construe it. The reason for putting in ships plying between the Atlantic and Pacific ports of the United States is that those ships touch, or can touch, at foreign ports, and can there pick up foreign oil tax-free.

Mr. WHITE. May I ask the Senator the origin of this suggestion?

Mr. REED. The origin was with some of the oil companies. Having received the suggestion from these companies, and feeling unable myself to detect any "joker" that might be in it, I submitted it first to the experts of the Joint Committee on Internal Revenue Taxation, and next to the Treasury Department, and was told by both of those authorities that the amendment seemed to them to be a proper one, and they saw no defect in it.

Mr. WHITE. Was it submitted to anyone having a special interest in the shipping of the United States? Was it submitted to the Shipping Board?

Mr. REED. No; I do not think it was, so far as I know; but I should think they would be very anxious to have it adopted. At the present time the trans-Atlantic liners which used to buy all their fuel oil in New York and other American ports are buying European oil in European ports, enough to carry them on the round trip. We are not only getting no tax out of those vessels but we are getting no business out of them.

Mr. WHITE. That relates to vessels in the North Atlantic trade.

Mr. REED. That is right.

Mr. WHITE. But what about other vessels?

Mr. REED. I am told by one of the Senators from California that this will be very helpful to them in enabling them to sell to the trans-Pacific trade.

Mr. WHITE. Of course, it is an entirely new suggestion so far as I am concerned, and I do not know that I have any very definite notions about it. I am just suspicious about it; that is all.

Mr. REED. What suspicion has the Senator?

Mr. WHITE. I am not sure that I like to see foreign ships and American ships put on precisely the same plane respecting this matter.

Mr. REED. Well, at the present time neither of them is buying any American oil. We want to get that business.

Mr. WHITE. Is that an entirely accurate statement?

Mr. REED. No; I think that is probably too sweeping. I should say that the vast bulk of the business has been lost. There may be exceptions.

Mr. FLETCHER. Mr. President, may I ask the Senator whether this provision imposes any additional tax on American shipping?

Mr. REED. No, Mr. President; it does not.

Mr. FLETCHER. I do not see how they could object, if it does not impose any additional tax on them.

Mr. REED. I do not see where they could have any objection.

Mr. CONNALLY. Mr. President, I desire to ask the Senator from Pennsylvania a question. Why should vessels engaged in whaling and the fisheries be exempt? They do not necessarily touch at foreign ports; do they?

Mr. REED. Because they can very easily do so.

Mr. CONNALLY. Where?

Mr. REED. Take a ship that goes whaling to the south Pacific Ocean: It can pick up its oil in a hundred places.

Mr. CONNALLY. I see no reason for exempting all the fishing industry and the whaling vessels when we make our coastwise

vessels engaged in commercial pursuits pay this tax. I see no reason why a vessel doing business between the Atlantic and the Pacific, going through the Panama Canal, all of which is our territory, should be exempt from this tax.

Mr. REED. Oh, no; on the contrary, the whole Caribbean Sea is not our territory by any means.

Mr. CONNALLY. The Panama Canal is under our control.

Mr. REED. The Panama Canal is; but those vessels are in a position to pick up foreign oil, and we want to get the business for American producers.

Mr. CONNALLY. I am not quarreling with the part with reference to foreign commerce; but I do not see any reason why we should exempt the fishing people and the whaling people from the payment of the tax.

Mr. REED. The whalers, I think, clearly ought to be exempted, because all of them go into foreign waters. The fishing ships may or may not.

Mr. CONNALLY. Where would they buy oil if they were going into the South Polar or Antarctic region? There are no oil stations there.

Mr. REED. They pass a hundred ports at which tankers from Persia could fill them up, and in which tankers are situated that would be glad to have the business.

Judgment of Texas Court of Civil Appeals—
Filed December 3, 1981

IN THE
COURT OF APPEALS
FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

No. 17862
From Harris County
Tr. Ct. No. 1,146,343
Opinion by SMITH, AJ

THE STATE OF TEXAS

To the District Court of Harris County, Greeting:

Before our Court of Appeals, on the 30th day of April, A.D. 1981, the cause upon appeal to revise or reverse your Judgment between COUNTY OF HARRIS, TEXAS ET AL. vs. XEROX CORPORATION was determined; and therein our said Court of Appeals made its order in these words:

> "This cause, being an appeal from the judgment rendered and entered by the court below on September 9, 1980, came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was error in the judgment, it is therefore consider adjudged and ordered that the judgment of the court below be reversed and judgment is here rendered that Xerox Corporation take nothing; that Harris County have judgment against Xerox Corporation in the sum of $131,311.97 plus penalties and interest for the tax years of 1976 and 1977; that the City of Houston have judgment for itself and the Houston Independent School District in the sum of $156,728.90 plus penalties and interest for the tax year 1977, and that the injunction issued by the trial court be dissolved and set aside.
>
> It is further ordered that the appellee, Xerox Corporation, pay all cost incurred by reason of this appeal.

It is furthered that this decision be certified below for observance. Judgment rendered by panel consisting of Chief Justice Coleman and Justices Peden and Smith."

WHEREFORE, we command you to observe the Order of our Court of Appeals, in this behalf; and in all things to have it duly recognized, obeyed and executed.

WITNESS, The Hon. FRANK EVANS, Chief Justice of our Said Court of Appeals, with the Seal thereof annexed, at HOUSTON, this the 3rd day of December A.D. 1981.

MARIBELLE REICH, *Clerk*.
By /s/ Cathy Crane, *Deputy*.

Motion to Dismiss or Affirm

1

Supreme Court, U.S.
FILED
MAR 23 1982
ALEXANDER L. STEVAS
CLERK

NO. 81-1489

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

XEROX CORPORATION,
Appellant

v.

COUNTY OF HARRIS, TEXAS,
AND
CITY OF HOUSTON, TEXAS
Appellees

On Appeal From The Texas Court Of Civil Appeals

MOTION TO DISMISS OR AFFIRM

MICHAEL H. DRISCOLL
County Attorney

EDWARD J. LANDRY
JOHN J. GREENE
Assistant County Attorneys
1001 Preston, Suite 634
Houston, Texas 77002
(713) 221-5101

Counsel for Appellee
County of Harris, Texas

March 9, 1982

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

QUESTIONS INVOLVED

1. WHEN IT IS DOUBTFUL THAT THE STATE COURT BELOW HAS HAD AN OPPORTUNITY TO AUTHORITATIVELY CONSTRUE THE CONSTITUTIONALITY OF A SPECIFIC STATE TAX STATUTE, DOES THE SUPREME COURT HAVE JURISDICTION TO CONSIDER THE VALIDITY OF THE STATE TAX GENERALLY?

2. WAS THE DECISION OF THE STATE COURT BELOW BASED ON AN ADEQUATE INDEPENDENT STATE PROCEDURAL GROUND SUFFICIENT TO UPHOLD THE DECISION ON A NON-FEDERAL BASIS?

TABLE OF CONTENTS

	Page
THE QUESTIONS INVOLVED	I
CASES	II
CONSTITUTIONAL PROVISIONS AND STATUTES	II
MOTION TO DISMISS OR AFFIRM	1
STATEMENT	2
THE QUESTIONS INVOLVED	2
ARGUMENT	3
1. Failure to Raise Specific Issues Below	3
2. Adequate Non-Federal Basis for State Decision	3
CONCLUSION	4
APPENDIX	7
1. Judgment of the District Court for the 165th District, Houston, Texas	7

TABLE OF AUTHORITIES

CASES

	Page
Charleston Federal Savings & Loan Ass'n, et al v. Alderson, 324 U.S. 182 (1945)	3
Herb v. Pitcairn, 324 U.S. 117 (1945)	4
Webb v. Webb, 101 S.Ct. 1889 (1981)	4
Wilson v. Cook, 327 U.S. 474 (1946)	3

CONSTITUTIONAL PROVISIONS AND STATUTES

CONSTITUTION

TEXAS CONSTITUTION, Article VIII, Section 1	2,3

STATUTES AND RULES

UNITED STATES CODE, 28 U.S.C. § 1257(2)	1,3
VERNON'S TEXAS CIVIL STATUTES, Article 7145 (Repealed)	2,3
TEXAS RULES OF CIVIL PROCEDURE, Rule 683	2,4

NO. 81-1489

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

XEROX CORPORATION,
Appellant

v.

COUNTY OF HARRIS, TEXAS,
AND
CITY OF HOUSTON, TEXAS
Appellees

On Appeal From The Texas Court Of Civil Appeals

MOTION TO DISMISS OR AFFIRM

Appellee County of Harris moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Texas Court of Civil Appeals, on appeal pursuant to 28 U.S.C. § 1257(2).

STATEMENT

On September 30, 1977, Xerox Corporation, Appellant, instituted a declaratory judgment proceeding against Harris County, Texas to declare certain business personal property exempt from local ad valorem taxation because the property was stored in federal bonded warehouses.

Prior to January 1, 1978, Xerox removed the property from Harris County. The property has not been subsequently taxed by Harris County, Texas. Xerox's pleadings in the Texas courts attacked the ad valorem tax generally and did not specifically allege the invalidity of Tex. Con. Art. VIII § I or Tex. Civ. Stat. Ann. Art. 7145 (repealed), the statutes now at issue before the United States Supreme Court. The trial court found in Xerox's favor. The Texas Court of Civil Appeals reversed, basing its decision on Federal grounds *and* on Texas law, namely, Tex. Rules Civ. Proc. 683.

QUESTIONS INVOLVED

1. WHEN IT IS DOUBTFUL THAT THE STATE COURT BELOW HAS HAD AN OPPORTUNITY TO AUTHORITATIVELY CONSTRUE THE CONSTITUTIONALITY OF A SPECIFIC STATE TAX STATUTE, DOES THE SUPREME COURT HAVE JURISDICTION TO CONSIDER THE VALIDITY OF THE STATE TAX GENERALLY?

2. WAS THE DECISION OF THE STATE COURT BELOW BASED ON AN ADEQUATE INDEPENDENT STATE PROCEDURAL GROUND SUFFICIENT TO UPHOLD THE DECISION ON A NON-FEDERAL BASIS?

ARGUMENT

1. THE APPELLANT XEROX FAILED TO RAISE THE ISSUE OF VALIDITY OF SPECIFIC STATE TAX STATUTES IN THE STATE COURTS.

When state tax statutes are challenged, the Supreme Court has consistently required that the Federal questions on appeal pursuant to 28 U.S.C. 1257(2) must have been specifically raised in the state courts. *Charleston Federal Savings & Loan Ass'n, et al v. Alderson,* 324 U.S. 182 (1945). Appellants did not specifically attack the Texas statutes which are now, for the first time, claimed to violate the Federal Constitution. Only the validity of the ad valorem tax generally, not the application of Tex. Con. Art. VIII § 1 or Tex. Civ. Ann. Art. 7145 (repealed), was challenged. Appellants do not mention in their petition, nor does the trial court nor the Texas Court of Civil Appeals, either challenged State law. Since only the tax generally and not the constitutionality as applied of the two State laws set out in Appellant's Jurisdictional Statement was considered by the Texas Courts, Xerox has failed to explicitly raise the issues below and cannot claim this Court has jurisdiction to review two statutes not specifically challenged in the Texas courts. *Wilson v. Cook,* 327 U.S. 474 (1946).

2. THERE IS AN ADEQUATE NON-FEDERAL GROUND TO UPHOLD THE DECISION OF THE TEXAS COURT OF CIVIL APPEALS.

The Texas Court of Civil Appeals in its opinion considered Appellee Harris County's third, fourth, and fifth points of error and agreed that the injunctive relief (see Appendix) obtained by Appellant Xerox in the trial

court failed to comply with Rule 683, Tex. Rules Civ. Proc., in that it (1) does not identify the parties enjoined, (2) does not state the reason for the issuance of the injunction, (3) does not identify the property involved, and (4) could be construed as operating for future taxes. Rule 683 is as follows:

> Rule 683. Form and Scope of Injunction or Restraining Order
>
> Every order granting an injunction and every restraining order shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

The Texas Court of Civil Appeals based its opinion, in part, expressly upon a substantial and sufficient non-federal ground, and the Supreme Court should not take jurisdiction to review the State Court's decree. *Herb v. Pitcairn,* 324 U.S. 117 (1945), *Webb v. Webb,* 101 S.Ct. 1889 (1981) at 1892 n.4.

CONCLUSION

For the foregoing reasons Harris County respectfully submits that the state statutes challenged by Appellants were not specifically reviewed by the State Court and that the Texas Court of Civil Appeals had an adequate independent state ground for its decision. The appeal

herein should be dismissed or in the alternative, the judgment of the Texas Court of Civil Appeals affirmed.

Respectfully submitted,

MICHAEL H. DRISCOLL
County Attorney

EDWARD J. LANDRY
JOHN J. GREENE
Assistant County Attorneys

1001 Preston, Suite 634
Houston, Texas 77002
(713) 221-5101

Counsel for Appellee
County of Harris, Texas

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing Motion to Dismiss or Affirm to the Supreme Court of the United States was served on the counsel listed below by mail on this ____ day of March, 1982 by depositing it in a United States post office with first class postage prepaid to each of those counsel at his post office address.

EDWARD J. LANDRY
Assistant County Attorney

Copies to:

Mr. Alfred H. Hoddinott, Jr.
800 Long Ridge Road
Stamford, Connecticutt 06904

Ms. Cheryl Helena Chapman
Assistant City Attorney
P. O. Box 1562
Houston, Texas 77001

Mr. Mark W. White
Attorney General, State of Texas
P. O. Box 12548
Austin, Texas 78711

APPENDIX

NO. 1,146,343

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
165TH JUDICIAL DISTRICT

XEROX CORPORATION

v.

COUNTY OF HARRIS, TEXAS, ET AL

JUDGMENT

On the 7th day of July, 1980, the above entitled and numbered cause came to be heard, in the absence of application for trial by jury, before this Court. Plaintiff, XEROX CORPORATION, appeared by and through its attorney of record. The Defendant, CITY OF HOUSTON, in behalf of itself and for the use and benefit of the Houston Independent School District, appeared through its attorney of record. The Defendant, HARRIS COUNTY, in behalf of itself and for the use and benefit for the State of Texas, the Harris County Flood Control District, the Port of Houston Authority, the Harris County Board of School Trustees, and the Harris County Hospital District, appeared by and through its attorney of record.

After presentation of the evidence, testimony, and argument of counsel, the Court found that in fact and under the United States Constitution, Federal Statutes and Regulations, the copiers held by XEROX CORPORATION at the Houston Terminal Warehouse, under Customs bond, were not subject to ad valorem taxation by Defendants. Based on such findings, the Court is of the opinion that judgment should be rendered in favor of Plaintiff.

It is accordingly, ORDERED, ADJUDGED and DECREED that:

1. The ad valorem taxes sought to be imposed on the above referenced property by Defendants for the years 1976 and 1977 are, and are hereby declared to be, illegal, void and unconstitutional;

2. Defendants be, and are hereby, permanently enjoined from assessing, collecting and enforcing said taxes against XEROX CORPORATION or any of its property, whether real, personal, mixed, tangible or intangible;

3. All relief sought by Defendants by way of their Counter-Claims is hereby denied and it is further ORDERED that Defendants take nothing by way of their Counter-Claims against XEROX CORPORATION;

4. Plaintiff's costs of court shall be borne by Plaintiff and Defendants' costs shall go untaxed.

SIGNED this _____ day of _____, 1980.

_____

LYNN N. HUGHES
District Judge

APPROVED:

LORANCE & THOMPSON

/s/ LARRY D. THOMPSON
Larry D. Thompson
Bar No. 19930000
303 Jackson Hill, Suite 300
Houston, Texas 77007
(713) 868-5560

APPROVED AS TO FORM ONLY:

COUNTY OF HARRIS, TEXAS

/s/ PAUL BIBLER, JR.
Paul Bibler, Jr.
Bar No. 02290000
634 Harris County Administration Building
1001 Preston
Houston, Texas 77002
(713) 221-5100

CITY OF HOUSTON, TEXAS

/s/ CHERYL HELENA CHAPMAN
Cheryl Helena Chapman
Bar No. 10694800
SPN 99999968
P. O. Box 1562
Houston, Texas 77001
(713) 221-5151

Motion to Dismiss or Affirm

2

Office - Supreme Court, U.S.
FILED
MAR 16 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-1489

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

XEROX CORPORATION,
Appellant,

v.

COUNTY OF HARRIS, TEXAS, and
CITY OF HOUSTON, TEXAS,
Appellees.

On Appeal From The Texas Court of Civil Appeals

MOTION TO DISMISS OR AFFIRM

F. J. COLEMAN, JR.
City Attorney

JAY. D. HOWELL, JR.
Senior Assistant City Attorney

CHERYL HELENA CHAPMAN,
Senior Assistant City Attorney
Counsel of Record

BELINDA TURNER SAULSBERRY
Assistant City Attorney
P. O. Box 1562
Houston, Texas 77251
(713) 222-5151
Counsel for Appellee,
City of Houston

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

I

QUESTION PRESENTED

Are nondiscriminatory ad valorem taxes assessed by state local taxing authorities violative of the commerce clause and the import-export clause of the United States Constitution when assessed against imported property stored in local customs bonded warehouses awaiting sale and shipment to a foreign country?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
TABLE OF AUTHORITIES	III
MOTION TO DISMISS OR AFFIRM	1
STATUTORY PROVISIONS	2
STATEMENT OF CASE	2
ARGUMENT	3
I. THIS CASE DOES NOT DRAW INTO QUESTION THE VALIDITY OF A STATE STATUTE	3
II. THIS CASE PRESENTS NO SUBSTANTIAL QUESTION	6
A. Introduction	6
B. Correctness of Lower Court's Decision	6
C. The *McGoldrick* case	7
D. The *American Smelting* case	9
E. No New Question of Law	9
III. THE QUESTION PRESENTED IN THE JURISDICTIONAL STATEMENT IS NOT SUPPORTED BY THE FACTS OF RECORD OR BY THE DECISION BELOW	10
CONCLUSION	11
APPENDIX	A-1

TABLE OF AUTHORITIES

CASES	Page
American Smelting & Refining Company v. The County of Contra Costa, 271 Cal. App. 2d 437, 77 Cal. Rptr., 570, appeal dismissed, 396 U.S. 273 (1969)	9
Bacon v. Illinois, 227 U.S. 504 (1912)	7
Brown v. Houston, 114 U.S. 622 (1885)	7, 11
Cardinale v. Louisiana, 394 U.S. 437 (1969)	5
Champlain Realty Company v. Town of Brattleboro, 260 U.S. 366 (1922)	7
Department of Revenue v. Association of Washington Stevedoring Cos., 435 U.S. 734 (1978)	6
Houston Chronicle Publishing Company v. City of Houston, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.).	5
Independent Warehouses, Inc. v. Scheele, 331 U.S. 70 (1947)	7
Louisville and Nashville R.R. Co. v. Woodford, 234 U.S. 46, 51 (1932)	4
Low v. Austin, 80 U.S. (13 Wall.) 29 (1871)	9
McGoldrick v. Gulf Oil Corporation, 309 U.S. 414 (1940)	7, 8, 9
Michelin v. Wages, 423 U.S. 276 (1976)	6, 9
Susquehanna Coal Company v. South Amboy, 228 U.S. 665 (1913)	7
Webb v. L.B. Walker and Associates, 544 S.W.2d 952, 957 (Tex. Civ. App.—Houston [14th Dist.] 1977, ref. n.r.e.)	5
Webb v. Webb, __U.S.__, 101 S.Ct. 1889 (1981)	6
Williams v. McSwain, 596 S.W.2d 583 (Tex. Civ. App.—Beaumont 1980, no writ)	5
Wilson v. Cook, 327 U.S. 474, 482 (1946)	5

UNITED STATES CONSTITUTION	
Art. 1, § 8 cl. 3	9

UNITED STATES STATUTES	
28 U.S.C. § 1257(2)	3, 4

UNITED STATES SUPREME COURT RULES	
Rule 15.1(a)	11

TEXAS REVISED CIVIL STATUTES ANNOTATED	
Art. 2524-1	2, 4
Art. 7145	4

NO. 81-1489

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

XEROX CORPORATION,
Appellant,

v.

COUNTY OF HARRIS, TEXAS, and
CITY OF HOUSTON, TEXAS,
Appellees.

On Appeal From The Texas Court of Civil Appeals

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court, City of Houston, Appellee in the above entitled cause, respectfully moves this Court to dismiss the appeal herein, or in the alternative, to affirm the judgment of the Texas Court of Civil Appeals, on the grounds that the appeal is not within this Court's jurisdiction, that the appeal does not raise a substantial federal question and that the Question Presented in the Jurisdictional Statement is not supported by the decision below or by the facts of record.

STATUTORY PROVISIONS

TEX. REV. CIV. STAT. ANN. art. 2524-1

> "Sec. 2. Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a Statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, Statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder."
>
> "Sec. 11. When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the Statute, ordinance, or franchise is alleged to be unconstitutional, the Attorney General of the State shall also be served with a copy of the proceeding and be entitled to be heard."

STATEMENT OF THE CASE

Appellant, Xerox Corporation ("Xerox"), exported copier component parts to Mexico where they were assembled. The assembled copiers were then imported into the United States under customs bond and shipped to Houston where they were stored in a local customs bonded warehouse until sold and shipped to a Latin American country. The majority of the copiers remained in the warehouse an average of seven and one-half to twenty-five months. Xerox utilized this circuitous export-im-

port-export arrangement to take advantage of the cheaper labor costs of Mexican workers, the more favorable United States Customs laws and Houston's excellent distribution facilities.

Appellee, City of Houston ("City"), imposed a nondiscriminatory ad valorem tax on the copiers while stored in the customs bonded warehouse. Xerox contested the tax by seeking an injunction and declaratory judgment. This case is on appeal from the decision of the Texas Court of Civil Appeals wherein the court sustained the tax against commerce clause and import-export clause attack. The decision below is reported at 619 S.W.2d 402 (1981).

ARGUMENT

I.

THIS CASE DOES NOT DRAW IN QUESTION THE VALIDITY OF A STATE STATUTE

The Appeal is not taken in conformity with 28 U.S.C. 1257(2).

28 U.S.C. 1257(2) states, in pertinent parts, that:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treatises or laws of the United States, and the decision is in favor of its validity."

Appellant expressly relies on this statute as the sole basis for this appeal. The identity of the statute invoking jurisdiction under 28 U.S.C. 1257(2) has not been specified. The only statute referenced in Appellant's Jurisdictional Statement is TEX. REV. CIV. STAT. ANN. art. 7145. The City does not derive its taxing authority from Article 7145. The City is a home rule jurisdiction authorized under the Texas Constitution to operate with full authority as a self-governing body. The Texas Constitution, the City Charter, and the City Code of Ordinances embody the City's full taxing authority.

In other documents, including Appellant's Jurisdictional Statement, Xerox merely refers to statutes or ordinances imposing the tax. (App. 3, 8) If Xerox's vague and general allegations were to be construed as having challenged the constitutional validity of any statute, then all three bodies of law would be declared unconstitutional and the City would not have had an opportunity to defend against the challenge. In *Louisville and Nashville R.R. Co. v. Woodford*, 234 U.S. 46, 51 (1932), the Court held that where the issue of the validity of a state statute has been "drawn in question" against a federal claim, the language requires that the federal question be raised properly under state procedures.

Xerox invoked lower court jurisdiction under TEX. REV. CIV. STAT. ANN. art. 2524-1, the Declaratory Judgment Act, praying that all "local ad valorem taxes on Xerox's copiers located at the Houston terminal warehouse are unconstitutional, illegal and void. . . ." (App. 8) This prayer is insufficient under Texas procedure to "draw in question" the validity of a state statute or ordinance. Under rules of pleading, which are applicable to

declaratory judgment suits, a challenge to the validity or constitutionality of a statute must be specifically or affirmatively pleaded. *Williams v. McSwain,* 596 S.W.2d 583 (Tex. Civ. App.—Beaumont 1980, no writ); *Webb v. L.B. Walker and Associates,* 544 S.W.2d 952, 957 (Tex. Civ. App.—Houston [14th Dist.] 1977, ref. n.r.e.). Failure to affirmatively plead denies the trial court jurisdiction to decide the issue. *Houston Chronicle Publishing Company v. City of Houston,* 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.). Under the Declaratory Judgment Act, failure to notify the State Attorney General that the validity of a state statute is at issue also denies the trial court jurisdiction to decide the issue. *Houston Chronicle Publishing Company v. City of Houston, supra.*

Since Xerox neither pleaded the issue nor notified the Attorney General, it did not and could not have raised the issue before the court, and the trial court had no jurisdiction to pass upon it. Before this Court, Xerox is raising for the first time the issue of the validity of the statute.

In order to "draw in question" the validity of any statute, this Court has stated:

> "It is not sufficient merely to attack the tax levied under the statute, or the right to collect the tax which has been levied, or to show that the validity of the tax alone has been considered. . . . The mere objection to an exercise of authority under a statute, whose validity is not attacked, cannot be made the basis of an appeal. . . ." *Wilson v. Cook,* 327 U.S. 474, 482 (1946).

This Court further said, in *Cardinale v. Louisiana,* 394 U.S. 437 (1969), that it cannot review on appeal a

judgment of a state court unless the highest court of the state has been apprised that a state statute is being assailed as invalid on federal grounds or when a statute, as applied, is so assailed, until it has an opportunity authoritatively to construe it. See also *Webb v. Webb*, ____U.S.____, 101 S.Ct. 1889 (1981).

II.

THIS CASE PRESENTS NO SUBSTANTIAL QUESTIONS

A. Introduction

Appellant raises no substantial federal questions which require plenary consideration with briefs on the merits and oral arguments. The Court of Civil Appeals was clearly correct in its decision—a decision which comports with long-standing national precedent. The decision conflicts with neither a Supreme Court nor a federal or state court of appeals decision, and no significantly new issue is brought before this Court.

B. Correctness of the Lower Court's Decision

The opinion of the Texas Court of Civil Appeals is so obviously correct that it should be summarily affirmed.

A nondiscriminatory tax on imports or exports not in transit is valid under the import-export clause. *Michelin v. Wages*, 423 U.S. 276 (1976); *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978). Xerox's argument that the copiers were "in transit" on tax day, ignores the law and the undisputed facts. Property stored for the business purpose or convenience of the owner is not in transit.

Bacon v. Illinois, 227 U.S. 504 (1912); *Champlain Realty Company v. Town of Brattleboro,* 260 U.S. 366 (1922). Property held indefinitely in the taxing state for purposes other than the exigencies of transportation is subject to local taxation. *Susquehanna Coal Company v. South Amboy,* 228 U.S. 665 (1913); *Independent Warehouses, Inc. v. Scheele,* 331 U.S. 70 (1947). And, property stored for sale is subject to tax whether it remains in the taxing jurisdiction "for a day or for two years", *Brown v. Houston,* 114 U.S. 622 (1885). In applying these principles, the court below stated:

> ". . . we find that there was a transportation stoppage of the warehoused copiers and that such stoppage was occasioned for business purposes of Xerox; that on taxation day the final destination of the goods was not determinable, as the property had not been sold or committed to further transportation; and that the business purpose in stoppage was profits for Xerox. We hold the warehoused Xerox copiers were no longer in transit."
> 619 S.W.2d at 406.

The commerce clause does not operate as a *per se* bar to the tax on Xerox's copiers. *Michelin v. Wages, supra.* Moreover, Congress has enacted no laws which would preempt the imposition of the tax, notwithstanding Xerox's misplaced reliance on *McGoldrick v. Gulf Oil Corporation, infra,* as authority to the contrary.

C. The McGoldrick Case

In *McGoldrick v. Gulf Oil Corporation,* 309 U.S. 414 (1940), the Court denied New York State the right to impose a sales tax on imported crude oil located in a customs bonded, manufacturing warehouse. The oil had

been sold for use as ships' stores to vessels engaged in foreign commerce. Three pieces of legislation were then in effect: the Tariff Act, Customs Regulation and Revenue Act. The Tariff Act authorized manufacturing in bond without the payment of duties on the imported crude. The customs regulation provided that goods under customs bond were not subject to local taxation. The Revenue Act, which laid a tax on imported crude, provided for an exemption when used in foreign commerce as ships' stores. Because there was a comprehensive scheme by Congress to encourage competition by American manufacturers in the sale of fuel oil abroad, the Court held that a tax on the sale of such oil amounted to an unlawful burden on commerce.

McGoldrick offers no precedential value for Xerox. The facts presented in this case are easily distinguishable from *McGoldrick*. Moreover, the holding in *McGoldrick* was expressly limited to its facts. In *McGoldrick* the oil was irrevocably committed to foreign commerce. The Xerox copiers were neither sold nor committed to export. Secondly, in *McGoldrick*, congressional intent to preempt the state taxation of imported crude was evidenced by two statutes, one federal regulation and legislative history. In support of its preemption argument, Xerox can point to no statute or regulation which expressly exempts the copiers from taxation or which otherwise evidences Congress' intent to exempt the copiers from state taxation. Finally, in *McGoldrick*, the tax fell on the sale of oil to purchasers using it in foreign commerce. Such a tax raises concerns that simply do not exist for an ad valorem tax which is *quid quo pro* for the benefits and services rendered to the copiers while located within the taxing

jurisdiction. *See Western Union Telegraph Company v. Taggart,* 163 U.S. 1 (1896).

The integrity of *McGoldrick* is unaffected by the lower court's decision. Therefore, it is not necessary for this Court to decide whether *McGoldrick* is still the law.

D. The American Smelting Case

The decision below is in accord with the only other vital appellate opinion addressing the taxability of imported property held in customs bond under the commerce clause. In *American Smelting & Refining Company v. The County of Contra Costa,* 271 Cal. App. 2d 437, 77 Cal. Rptr., 570, *appeal dismissed,* 396 U.S. 273 (1969), the court held that the commerce clause does not preclude a tax on property held under customs bond. It was only in the narrow instance where the foreign producer retained title to the imported property, which by virtue of pre-existing contracts was unconditionally appropriated for re-export, that the court denied state taxation.

E. No New Questions of Law

The appeal by Xerox brings before this Court no new questions of law. The exceptional feature of this case is that the constitutionality of the tax is challenged under U.S. Const. art. 1, § 8 cl. 3, the commerce clause. The courts have rarely had the opportunity to consider the taxability of imports under the commerce clause, and for good reason. Prior to *Michelin* the "original package" doctrine of *Low v. Austin,* 80 U.S. (13 Wall.) 29 (1871) was the law of the land. *Michelin* overruled *Low* by holding that imported goods stored in their original pack-

age are not immune under the import-export clause from the imposition of a nondiscriminatory tax. The constitutionality of the tax may therefore be resolved by using traditional commerce clause analyses, namely: does the tax burden commerce; were the goods in transit; had Congress preempted the field from state and local taxation?

III.

THE QUESTION PRESENTED IN THE JURISDICTIONAL STATEMENT IS NOT SUPPORTED BY THE FACTS OF RECORD OR BY THE DECISION BELOW

Appellant Xerox presents the question:

> "May a state assess an ad valorem tax on goods that
>
> a) were continuously in the flow of foreign commerce;
>
> b) never entered domestic commerce or became part of the common mass of property within the state;
>
> c) paused only temporarily within the state; and
>
> d) were continuously under the supervision, custody and control of the United States Customs Service." (Jurisdictional Statement, p. i.)

The question sets forth conclusions which are not supported by the record. The undisputed facts are that the copiers were stored pending sale for periods averaging between seven to twenty-five months and that on tax day, none of the copiers had been sold or committed to further transportation. These facts do not support the conclusion that the copiers had not become a part of the

common mass of property within the state or had paused temporarily within the state. *Brown v. Houston, supra.* Moreover, the question does not present the ultimate issues which were briefed and argued in this case and which were decided by the court below. For those reasons, Xerox has neither adequately nor sufficiently presented the question of its appeal, and therefore has failed to comply with United States Supreme Court Rule 15.1(a).

CONCLUSION

For the reasons set forth above, it is submitted that the Court has no appeal jurisdiction; that the Appellant has presented no substantial question for the decision of this Court; that the question presented in the Jurisdictional Statement is not supported by the facts of record or the decision below; and Appellee prays that the appeal be dismissed or the judgment of the Texas Court of Civil Appeals be affirmed.

Respectfully submitted,

F. J. COLEMAN, JR.
City Attorney

JAY. D. HOWELL, JR.
Senior Assistant City Attorney

CHERYL HELENA CHAPMAN,
Senior Assistant City Attorney
Counsel of Record

BELINDA TURNER SAULSBERRY
Assistant City Attorney

P. O. Box 1562
Houston, Texas 77251
(713) 222-5151

Counsel for Appellee,
City of Houston

APPENDIX A

NO. 1,146,343

IN THE DISTRICT COURT
HARRIS COUNTY, TEXAS
125th Judicial District

XEROX CORPORATION

v.

COUNTY OF HARRIS, TEXAS, ET AL

PLAINTIFF'S FIRST AMENDED
ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW XEROX CORPORATION, (hereinafter "Xerox") complaining of the COUNTY OF HARRIS, TEXAS (hereinafter "Harris County"), the CITY OF HOUSTON (hereinafter "City"), and HOUSTON INDEPENDENT SCHOOL DISTRICT (hereinafter "School District"), Defendants, and for cause of action would show:

I.

Xerox is incorporated under the laws of New York and is duly authorized to transact business in the State of Texas. Harris County has already been served and has answered this action. The City of Houston and the School District are duly authorized taxing authorities in the State of Texas; and the City of Houston is empowered to collect both its and the School District's taxes. The City of Houston and the School District may be served by serving

the Mayor of the City of Houston, Jim McConn, at City Hall, Houston, Texas.

II.

Xerox is a manufacturer and seller of copier machines, engaging in both domestic and international commerce. Pursuant to its international trade, Xerox stores copiers (Models 3100, 3103 and 660) under United States Customs Bond in the Houston Terminal Warehouse located at 701 North San Jacinto, Houston, Texas, awaiting shipment to Latin American countries.

Xerox manufactures the parts for these copiers at its main manufacturing facility in New York. These parts are shipped to the Mexico affiliate of Xerox, in Mexico City, and are assembled into the final product. After manufacturing, the copiers are separately packaged and shipped to Nuevo Laredo, Mexico, and at this point, are placed in Customs Bond. The copiers are then shipped, by truck, in Customs Bond, to the Houston Terminal Warehouse where they remain in Customs Bond and under continuous Customs control and supervision until shipped to Latin America, pursuant to orders placed with Xerox by its various Latin American affiliates. From the time these copiers enter the United States until they leave the United States, either through the Houston International Trade facilities or via Miami, Florida, the copiers are under the strict, constant control and regulation of the United States Customs Service.

In the three year period in which Xerox has used the Houston Terminal Warehouse facilities, over ten thousand copiers passed through said warehouse; none of them have entered the commerce of the United States; and vir-

tually all have entered Latin American countries. Houston Terminal Warehouse stores Xerox copiers that are destined exclusively for foreign trade.

III.

By statute or ordinance, the various taxing authorities herein, may impose, assess and collect ad valorem taxes on personal property, which is within each taxing authority's boundaries and which is subject to such tax. The various tax schedules are as follows:

(1) County of Harris—$1.84 per $100.00 valuation upon an assessed valuation equal to thirty-two (32) percent of actual valuation;

(2) State of Texas—ten cents per $100.00 valuation upon an assessed valuation equal to thirty-two (32) percent of actual valuation;

(3) City of Houston—$1.58 per $100.00 valuation upon an assessed valuation equal to fifty-three (53) percent of actual valuation;

(4) School District—$1.70 per $100.00 valuation upon an assessed valuation equal to fifty-three (53) percent of actual valuation.

All of the ad valorem taxes assessed by the taxing authorities herein for the year 1977 are presently due and will all become delinquent by February 1, 1978. If taxes are delinquent, the taxing authorities herein may enforce collection thereof.

IV.

On January 1, 1977, Xerox was the owner of the aforementioned copiers at the Houston Terminal Warehouse.

Within the time and in the manner prescribed by law, Xerox filed an application requesting an exemption with respect to these copiers. At all times material hereto, Xerox had a warehouse in Houston for storage of copiers it owns, leases, and maintains for domestic use in the Harris County area; Xerox does not now, and never has, claimed an exemption for these domestic-use copiers.

Subsequent to filing the request for an exemption, Xerox received a notice from the various taxing authorities herein advising Xerox that its request for an exemption with respect to the copiers at Houston Terminal Warehouse was denied. The copiers at said warehouse on January 1, 1977, were placed on the tax rolls of the taxing authorities as follows: (1) County of Harris—$53,084.37; (2) State of Texas—$2,285.02; (3) City of Houston—$75,497.46; (4) School District—$81,231.44; Total—$212,698.29.

V.

Article 1, Section 8, Clause 3, of the United States Constitution provides:

> "The Congress shall have the power . . . to regulate commerce with foreign nations, and among the several states and with the Indian Tribes."

Pursuant to the Commerce Clause, Congress has promulgated Statutes (19 U.S.C. § 1551 et seq.) and, pursuant to these Statutes, the Secretary of Transportation has promulgated regulations (19 C.R.F. § 19.1 et seq.) which frees goods stored in Customs bonded warehouses of any import duties, and if such goods are exported and not used for domestic consumption, no duty on the importa-

tion can be levied. The purpose and effect of the Statutes and Regulations is to free American enterprises from extra financial burdens so that these enterprises can effectively compete in foreign commerce. The Federal purpose, through its Statutes and Regulations, of granting American businesses this competitive advantage in their international commerce and trade, pre-empts any attempt by local governments to place taxes on the merchandise of such businesses. To allow local taxes, e.g., ad valorem taxes on merchandise having a foreign destination, would effectively abrogate the Federal plan and purpose of granting this competitive advantage. Thus, the local tax must yield, under the supremacy clause of the Federal Constitution, to the dictates of the Federal Statutes and Regulations.

VI.

Article 1, Section 10, Clause 2 of the United States Constitution provides:

> "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of Congress."

Congress has not consented to the imposition of ad valorem taxes on goods in a Customs Bonded warehouse and the Harris County ad valorem taxes are not necessary for the execution of any inspection laws of Texas, or any political sub-division thereof, including Harris County.

The Xerox copiers are protected by the import-export clause as the only time the copiers are ever "at rest" and not physically being transported, while in Texas, is when the copiers are under Customs bond in the Houston Terminal Warehouse. As indicated, goods in a Customs bonded warehouse are exempt from local taxation. In addition, Federal Statutes allow goods in a Customs bonded warehouse to remain for a period of three years (with routine extensions of at least one year) before any duty can be imposed on such goods. Effectively, this is a congressional determination that the goods have not entered the domestic marketplace and are still "in transit". Thus, the Xerox copiers are continually in import-export transit and are constitutionally exempt from local taxation.

VII.

Xerox has consistently claimed the exemptions for its copiers from the ad valorem taxes, based on the decisions, Statutes and Regulations pursuant to the Commerce Clause and based on the Import-Export Clause; and has at all times made same known to the taxing authorities herein.

VIII.

The taxing authorities herein have each and all refused and denied the claim of Xerox of a tax exemption for the copiers located at the Houston Terminal Warehouse. Said taxes have been assessed by the various taxing authorities.

Defendants are insisting that Xerox pay the tax and are threatening to assess and collect and to continue to assess and collect such illegal and unconstitutional taxes.

IX.

There exists an actual, substantial, immediate and bona fide controversy between Xerox and the Defendants as to the legality and constitutionality of the imposition of the local ad valorem taxes on Xerox's copiers located at the Houston Terminal Warehouse, and Xerox seeks herein and is entitled to have a declaration that said taxes are improper, illegal and unconstitutional and may not be imposed or collected.

X.

As of February 1, 1978, Xerox will have no adequate remedy at law and will be irreparably damaged, unless Defendants are enjoined from collecting said tax. Article 7266, V.A.T.S., allows the Tax-Assessor-Collector to summarily seize and sell, without Court process, any, and all personal property of Xerox located in Harris County, and apply same to reduce the amount of the illegal tax assessed against Xerox. Similarly, the City of Houston is authorized, pursuant to Article 3, Section 2 and 3 of the Houston City Charter and Section 44-41 of the Houston City Code, to summarily seize and sell, without Court process, any and all personal property of Xerox located within the City of Houston, or the boundaries of the School District and apply same to reduce the amount of the illegal tax assessed against Xerox.

Accordingly, prior to February 1, 1978, upon hearing hereof, Defendants should be temporarily enjoined from the enforcement or collection of said illegal tax, and from seizure of, levy upon or sale of any of Xerox's property, and from any other means of enforcement by said Defendants of the illegal tax on Xerox's copiers. Upon final hearing, said injunction should be made permanent.

WHEREFORE, PREMISES CONSIDERED, Xerox prays that Defendants be cited to appear and answer herein, and that

(1) Pursuant to Article 2524-1, V.A.T.S., this Court declare and adjudge that the State, County, City, School District, and all other local ad valorem taxes on Xerox's copiers located at the Houston Terminal Warehouse are unconstitutional, illegal and void;

(2) Prior to February 1, 1978, Defendants be temporarily enjoined from any collection, enforcement, or attempted enforcement of the unlawful tax on Xerox's copiers, in question pending a final determination hereof;

(3) Defendants be permanently enjoined from assessing, collecting, and enforcing said unconstitutional, illegal and void tax against Xerox or any of its property, whether real, personal, mixed, intangible or tangible;

(4) And for general relief, both legal and equitable, to which Xerox is just entitled.

Respectfully submitted,

LORANCE, THOMPSON & WITTIG

By /s/

LARRY D. THOMPSON
ATTORNEY FOR PLAINTIFF
609 Fannin, Suite 2121
Houston, Texas 77002
713/222-1304

Appellant's Reply Brief

Supreme Court, U.S.
FILED
MAR 23 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1489

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

XEROX CORPORATION,

Appellant,

—v.—

COUNTY OF HARRIS, TEXAS, and
CITY OF HOUSTON, TEXAS,

Appellees.

APPEAL FROM THE TEXAS COURT OF CIVIL APPEALS

BRIEF OPPOSING MOTIONS TO DISMISS OR AFFIRM

ALFRED H. HODDINOTT, JR.
800 Long Ridge Road
Stamford, Connecticut 06904
(203) 329-8700

Counsel for Appellant

March 23, 1982

TABLE OF CONTENTS

	PAGE
JURISDICTION	1
SUBSTANTIAL QUESTION	5
CONCLUSION	6

TABLE OF AUTHORITIES

Cases	PAGE
Adamson v. California, 332 U.S. 46 (1947)	4
American Smelting & Refining Co. v. County of Contra Costa, 271 Cal. App. 2d 437, 77 Cal. Rptr. 570, *appeal dismissed*, 396 U.S. 273 (1969)	5
Anderson v. McRae, 495 S.W.2d 351 (Tex. Civ. App. 1973)	2, 3
Cardinale v. Louisiana, 394 U.S. 437 (1969)	3
Charleston Federal Savings & Loan Ass'n v. Alderson, 324 U.S. 182 (1945)	2, 3
Clear Lake City Water Authority v. Clear Lake Utilities Co., 549 S.W.2d 385 (Tex. 1977)	4
Commissioners Court of Harris County v. Peoples National Utility Co., 538 S.W.2d 228 (Tex. Civ. App. 1976)	3
Houston Chronicle Publishing Co. v. City of Houston, 531 S.W.2d 177 (Tex. Civ. App. 1975)	3
Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979)	4
Louisville & Nashville R.R. v. Woodford, 234 U.S. 46 (1932)	3
McGoldrick v. Gulf Oil Corp., 309 U.S. 414 (1940)	5
Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976)	6
Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954)	4
National Distillers Products Corp. v. City & County of San Francisco, 141 Cal. App. 2d 651, 297 P.2d 61, *cert. denied*, 352 U.S. 928 (1956)	5

PAGE

Parrot v. City of Tallahassee, 381 U.S. 129 (1965) 2

Torcaso v. Watkins, 367 U.S. 488 (1961) 4

Webb v. L.B. Walker & Associates, 544 S.W.2d 952 (Tex. Civ. App. 1977) 3

Webb v. Webb, 451 U.S. 493 (1981) 3

Wichita County v. Robinson, 276 S.W.2d 509 (Tex. 1955) 3, 4

Williams v. McSwain, 596 S.W.2d 583 (Tex. Civ. App. 1980) 3

Wilson v. Cook, 327 U.S. 474 (1946) 3

Constitutions

TEXAS

Article VIII, Section 1 4

Statutes and Rules

UNITED STATES CODE

28 U.S.C. § 1257(2) 4

28 U.S.C. § 2403(b) 1

UNITED STATES SUPREME COURT RULES

Rule 28.1 1

Rule 28.4(c) 1, 4

TEXAS REVISED CIVIL STATUTES ANNOTATED

Article 2524-1, §§ 11, 12 3

Article 7145 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1489

XEROX CORPORATION,

Appellant,

—v.—

COUNTY OF HARRIS, TEXAS, and
CITY OF HOUSTON, TEXAS,

Appellees.

APPEAL FROM THE TEXAS COURT OF CIVIL APPEALS

BRIEF OPPOSING MOTIONS TO DISMISS OR AFFIRM

Appellant Xerox Corporation ("Xerox") submits this memorandum in opposition to the motions to dismiss or affirm filed by appellees County of Harris, Texas ("the County") and City of Houston ("the City").[1]

JURISDICTION

After more than four years of litigation in four courts, appellees for the first time suddenly claim to have discovered jurisdictional defects. They are all without merit.[2]

---

1 Xerox' listing pursuant to Supreme Court Rule 28.1 is set forth in its Jurisdictional Statement ("Juris. Stmt.") at i, n. While served pursuant to Supreme Court Rule 28.4(c) and 28 U.S.C. § 2403(b), the Attorney General of the State of Texas has not filed a response.

2 While the County also alleges that there is an "adequate non-federal" procedural ground to uphold the decision, that claim also has no

1. The main thrust of the City's claim is that Xerox' First Amended Original Petition, which it concedes alleged that local ad valorem taxes were "unconstitutional, illegal and void", was somehow "insufficient" to raise constitutional issues. City motion at 4-5. That is just not so.

There has never been any confusion at any stage of this case as to what the issues are. The pertinent portions of the U.S. Constitution were cited in the First Amended Original Petition, and Xerox repeatedly alleged the conflict between the Constitution and the taxes in question.[3] Pleadings in Texas are to be liberally construed in favor of the plaintiff and to support the judgment, especially where, as here, defendants took no exceptions to those pleadings. *Anderson v. McRae,* 495 S.W.2d 351, 356 (Tex. Civ. App. 1973). Certainly the City knew what the case was all about, for it has already forcefully briefed the constitutional issues before three other courts, and argued them twice. Just as clearly, the opinions of the courts below reflect that those courts fully understood, considered and decided the constitutional questions, Juris. Stmt. App. at 4a-8a, 12a-13a, and this Court will not inquire as to how the questions were raised when they were actually considered and decided by the state court. *Charleston Federal Savings & Loan Ass'n v. Alderson,* 324 U.S. 182, 185-86 (1945).

The opinions of this Court referred to by the City hold that the Court will not accept appellate jurisdiction where the constitutional issues were not raised and considered by the

---

legal or factual basis. The Texas Court of Civil Appeals decided constitutional issues in this case, and with respect to the procedural questions concerning the form of injunctive relief the County refers to, it stated that "[o]ur disposition of previous points of error makes these objections irrelevant . . . . " Juris. Stmt. App. at 9a. Accordingly, those points cannot ground a motion to dismiss. See *Parrot v. City of Tallahassee,* 381 U.S. 129 (1965).

3 The petition contains no less than nine references to the Constitution or the unconstitutionality of those taxes. (City motion App. at A-5–A-8)

state courts below.[4] And the Texas cases the City cites merely require sufficiently clear pleadings so that the constitutional issues are evident.[5] Xerox has no quarrel with those tenets, for that is exactly what happened here.

2. The City goes on to claim, some four years after the case was filed, that the Attorney General of Texas was not impleaded, and that under TEX. REV. CIV. STAT. ANN. art. 2524-1, § 11, ("§ 11"), that fact somehow strips this Court of jurisdiction.

The obvious purpose of § 11 is to insure that the State's interests are protected in litigation attacking the constitutionality of its statutes. *Wichita County v. Robinson,* 276 S.W.2d 509, 511 (Tex. 1955). The statute is remedial, "is to be liberally construed and administered", art. 2524-1, § 12, "and should not be hedged about by technicalities." *Anderson v. McRae, supra* at 356. Obviously, appellees here have vigorously defended the interests of the State, and in the only case cited in support of the City's proposition, *Houston Chronicle Publishing Co. v. City of Houston, supra,* while the Attorney General was not served or made a party, he participated in the case, and the court went on to decide the constitutional issues. *Id.* at 182. As emphasized *infra,* this appeal concerns the *application* of Texas law and is not an allegation of *per se* unconstitutionality, so it is doubtful if § 11 even applies. The necessity for service on the Attorney General has not been decided by the Supreme Court of Texas, see *Commissioners Court of Harris County v. Peoples National Utility Co.,* 538 S.W.2d 228, 229 (Tex. Civ. App. 1976), and, indeed, it has rejected the contention that

---

4 *Webb v. Webb,* 451 U.S. 493 (1981); *Cardinale v. Louisiana,* 394 U.S. 437 (1969); *Wilson v. Cook,* 327 U.S. 474, 482 (1946); *Charleston Federal Savings & Loan Ass'n v. Alderson, supra; Louisville & Nashville R.R. v. Woodford,* 234 U.S. 46, 51 (1932).

5 *Williams v. McSwain,* 596 S.W.2d 583 (Tex. Civ. App. 1980); *Webb v. L.B. Walker & Associates,* 544 S.W.2d 952, 957 (Tex. Civ. App. 1977); *Houston Chronicle Publishing Co. v. City of Houston,* 531 S.W.2d 177 (Tex. Civ. App. 1975).

non-compliance with § 11 uniformly constitutes a jurisdictional defect. *Clear Lake City Water Authority v. Clear Lake Utilities Co.*, 549 S.W.2d 385, 388-89 (Tex. 1977). In any event, service has now been accomplished, since Xerox served the Attorney General pursuant to Supreme Court Rule 28.4(c). Juris. Stmt. at i, n. The Attorney General need not be a party, *Wichita County v. Robinson, supra* at 511, and he apparently has concluded that the interests of the State are adequately protected here, as he has not elected to file a separate response. Xerox submits that nothing more is required.

3. The City's contention that this case will somehow result in the wholesale declaration of invalidity of large portions of Texas law misstates the record, and attempts to create an issue that really doesn't exist. Unquestionably the taxing authority of the City is involved, because Xerox has cited not only TEX. REV. CIV. STAT. ANN. art. 7145, but also the Texas Constitution, article VIII, section 1, which the City apparently concedes is its taxing authority. City motion at 4. Since Title 28 U.S.C. § 1257(2) is not limited to "statutes" as such, but encompasses state constitutional provisions as well, *Torcaso v. Watkins,* 367 U.S. 488 (1961); *Adamson v. California,* 332 U.S. 46 (1947), legislation applicable to both appellees is at issue. But the point is that Xerox does not seek a declaration that these Texas tax laws are unconstitutional *per se.* What it does claim is that their *application* to Xerox' copiers in customs bonded warehouses is unconstitutional, Juris. Stmt. at 2, and where the constitutionality of a tax statute, *as applied,* is sustained by the state court, *as applied,* this Court has jurisdiction. *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 440-41 (1979). Since that is what happened here, jurisdiction is clear.

4. Xerox submits that it is woefully late for appellees to suddenly contend there has been a defective constitutional challenge. As this Court stated in *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 165 n.4 (1954),

We think there is no substance to this contention. In their complaints and continuously thereafter appellants specifically challenged the validity of the tax statute under the Commerce Clause. The trial court held the tax invalid as violating the Commerce Clause. The Court of Civil Appeals expressly stated that the question for its decision was whether the statute as applied to appellants "violates the commerce clause of the Constitution of the United States. If so it is void, if not it is valid." Since the State courts have clearly treated the single issue here presented as properly raised and preserved, and since appellees first suggested the contrary in their brief on argument in this Court, we think the objections to jurisdiction are not well taken.

SUBSTANTIAL QUESTION

On the question of substantiality, the City attempts to distinguish *McGoldrick* and *American Smelting,*[6] ignore *National Distillers Products Corp.*[7] (where taxes similar to those in question were held unconstitutional) and content itself with what is essentially a restatement of the opinion below. City motion at 6-9. Xerox submits that the errors in those arguments were fully discussed in the Jurisdictional Statement at 10-17, and that discussion will not be repeated here.

The County apparently concedes that the Jurisdictional Statement presents an important federal question, for its motion is silent on the issue.

Left unanswered are Xerox' substantial contentions that summary affirmance or dismissal will

---

6 *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414 (1940); *American Smelting & Refining Co. v. County of Contra Costa*, 271 Cal. App. 2d 437, 77 Cal. Rptr. 570, *appeal dismissed*, 396 U.S. 273 (1969).

7 *National Distillers Products Corp. v. City & County of San Francisco*, 141 Cal. App. 2d 651, 297 P.2d 61, *cert. denied*, 352 U.S. 928 (1956).

a) inferentially overrule this Court's holding in *McGoldrick;*

b) extend the *Michelin* test[8] to goods "in transit" without full plenary consideration;

c) expand the definition of "in transit" well beyond permissible limits; and

d) severely impact the foreign commerce of the United States by destroying the usefulness of the congressionally mandated system of customs bonded warehouses.

For the reasons previously stated, Xerox urges that if this is to occur, it should be only after full and complete consideration by the Court.

CONCLUSION

It is submitted, therefore, that this Court has jurisdiction, and that the question presented merits plenary consideration.

Respectfully submitted,

ALFRED H. HODDINOTT, JR.
800 Long Ridge Road
Stamford, Connecticut 06904
(203) 329-8700

Counsel for Appellant

March 23, 1982

---

8 *Michelin Tire Corp. v. Wages,* 423 U.S. 276 (1976).

Appellant's Brief

Office - Supreme Court, U.S.
FILED
MAY 19 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1489

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

XEROX CORPORATION,

Appellant,

—v.—

COUNTY OF HARRIS, TEXAS, and
CITY OF HOUSTON, TEXAS,

Appellees.

APPEAL FROM THE TEXAS COURT OF CIVIL APPEALS

APPELLANT'S BRIEF

ALFRED H. HODDINOTT, JR.
800 Long Ridge Road
Stamford, Connecticut 06904
(203) 329-8700
Counsel for Appellant

May 19, 1982

QUESTION PRESENTED

Appellant Xerox Corporation ("Xerox"), through subsidiaries, assembled copying machines abroad, shipped them to a customs bonded warehouse in Texas, stored them temporarily and then reshipped them abroad, at all times under customs bond.

May a state assess an ad valorem tax on goods that

(a) were continuously in the flow of foreign commerce;

(b) never entered domestic commerce or became part of the common mass of property within the state;

(c) paused only temporarily within the state; and

(d) were continuously under the supervision, custody and control of the United States Customs Service.

LIST OF PARTIES

The parties to this proceeding are as listed in the caption. Pursuant to Supreme Court Rule 28.4(c), a copy of the notices of appeal and jurisdictional statement were served upon the Attorney General of the State of Texas, since 28 U.S.C. § 2403(b) (1976) may be applicable, but he has not appeared. In compliance with Supreme Court Rule 28.1, Xerox, a New York corporation, states that it has no parent or affiliates. Xerox has one United States subsidiary which is not wholly owned—Rank Xerox Business Equipment, Inc., a Delaware corporation. Xerox also has other subsidiaries, as defined by the Securities and Exchange Commission, in a number of foreign countries: Xerox do Brasil, S.A.; Xerox de Mexico, S.A. de C.V.; Xerox del Peru, S.A.; Xerox de Venezuela, C.A.; Xerox de Colombia, S.A.; Rank Xerox Limited; Rank Xerox Holding B.V.; Rank Xerox Manufacturing (Nederland) B.V.; Rank Xerox Fabrikations G.m.b.H.; Societe Industrielle Rank Xerox S.A.; Fuji Xerox Co., Ltd.; Office de Transformation Papetiere S.A.; Rank Xerox Espanola S.A.; Rank Xerox (N.Z.) Ltd.; and Rank Xerox (Australia) Pty. Ltd.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES	3
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	8
ARGUMENT	10
I. COMMERCE CLAUSE	10
A. Foreign Commerce	10
B. Customs Bonded Warehouses	11
C. State Taxation of Goods In Customs Bonded Warehouses Prohibited—The *McGoldrick* Case	16
II. IMPORT-EXPORT CLAUSE	20
A. State Property Taxation of Goods "In Transit" Prohibited—The *Michelin* Case	20
B. Xerox' Copiers Were "In Transit"	22
C. State Taxation of Goods "In Transit" Prevents the Federal Government from Speaking With One Voice on Foreign Commerce	24
CONCLUSION	26

TABLE OF AUTHORITIES

Cases PAGE

American Smelting and Refining Co. v. County of Contra Costa, 271 Cal. App. 2d 437, 77 Cal. Rptr. 570, *appeal dismissed*, 396 U.S. 273 (1969)..... 17n, 19

Ammex Warehouse Co. v. Department of Alcoholic Beverage Control, 224 F.Supp. 546 (S.D.Cal. 1963), *aff'd*, 378 U.S. 124 (1964)..... 11n, 14, 23

Bacon (Wabash Elevator) v. Illinois, 227 U.S. 504 (1913) 22n

Board of Trustees v. United States, 289 U.S. 48 (1933) .11, 12

Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827)... 21n

Calvert v. Zanes-Ewalt Warehouse, Inc., 502 S.W.2d 689 (Tex. 1973)..... 22n

Department of Revenue v. Association of Washington Stevedoring Companies, 435 U.S. 734 (1978)..... 21n, 24

District of Columbia v. International Distributing Corp., 331 F.2d 817 (D.C. Cir. 1964)..... 14, 23

Epstein v. Lordi, 261 F.Supp. 921 (D.N.J. 1966), *aff'd*, 389 U.S. 29 (1967)..... 11

Fabbri v. Murphy, 95 U.S. 191 (1877)..... 12n, 15, 23

Hooven & Allison Co. v. Evatt, 324 U.S. 652 (1945)... 21n

Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964)..... 11n

Independent Warehouses, Inc. v. Scheele, 331 U.S. 70 (1947)..... 22n

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979)..... 2, 8, 11, 20, 23, 24-25

PAGE

Kosydar v. National Cash Register Co., 417 U.S. 62 (1974) 22

Low v. Austin, 80 U.S. (13 Wall.) 29 (1872) 17, 21n

McGoldrick v. Gulf Oil Corp., 309 U.S. 414 (1940) 9, 11, 16-20

Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976) 9, 17, 20-21, 22n, 24-25

National Distillers Products Corp. v. City and County of San Francisco, 141 Cal. App. 2d 651, 297 P.2d 61, *cert. denied*, 352 U.S. 928 (1956) 19

Susquehanna Coal Co. v. City of South Amboy, 228 U.S. 665 (1913) 22n

Stone & Downer Co. v. United States, 19 C.C.P.A. 259 (1931) 15

United States v. Ehrgott, 182 F. 267 (C.C.S.D.N.Y. 1910) 14, 16, 23

Wells Fargo Nevada Nat. Bank v. Haslett Warehouse Co., 60 Cal. App. 225, 212 P. 647 (1923) 16

Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534 (1959) 21n

Constitutions

UNITED STATES

Article I, Section 8, Clause 3 ..... 3, 7, 8, 10

Article I, Section 10, Clause 2 ..... 3, 7, 9, 20

TEXAS

Article VIII, Section 1 4

PAGE

Statutes and Rules

UNITED STATES CODE

19 U.S.C. § 1311 (1976) 16

19 U.S.C. § 1555 (1976) 3, 12

19 U.S.C. § 1556 (1976) 3, 15, 18, 19

19 U.S.C. § 1557(a) (1976) 3, 9, 12, 18, 19, 23, 24

28 U.S.C. § 1257(2) (1976) 2

28 U.S.C. § 2403(b) (1976) ii

UNITED STATES SUPREME COURT RULES

Rule 28.1 ii

Rule 28.4(c) ii

UNITED STATES STATUTES AT LARGE

Warehousing Act of 1846, ch. 84, 9 Stat. 53 (1846) ... 12n, 13, 15

Act of March 28, 1854, ch. 30, § 4, 10 Stat. 270, 271 (1854) 12n

Act of September 21, 1922, ch. 356, Title IV, Part 4, 42 Stat. 858, 977 (1922) 12n

Tariff Act of 1930, ch. 497, 46 Stat. 590 (1930) 12n, 16, 18

Act of June 25, 1938, ch. 679, 52 Stat. 1077, 1087 (1938) 12n

Customs Procedural Reform and Simplification Act of 1978, Pub.L.No. 95-410, § 108, 92 Stat. 888, 892 (1978) 12n

VERNON'S TEXAS CIVIL STATUTES

Article 7145 4

PAGE

CODE OF FEDERAL REGULATIONS

19 C.F.R. §§ 19.1-19.6 (1981) 12

19 C.F.R. § 19.2(c) (1981) 22

19 C.F.R. § 19.6(c) n.11 (1981) 16, 17

Miscellaneous

H.R. REP. NO. 411, 26th Cong., 1st Sess. 2-3 (1846) 13, 14n

S. REP. NO. 778, 95th Cong., 2d Sess. 16 (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 2211, 2227 ..... 12n

App. to CONG. GLOBE, 29th Cong., 1st Sess. 789-798 (1846) 13, 14, 15n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1489

XEROX CORPORATION,

Appellant,

—v.—

COUNTY OF HARRIS, TEXAS, and
CITY OF HOUSTON, TEXAS,

Appellees.

APPEAL FROM THE TEXAS COURT OF CIVIL APPEALS

APPELLANT'S BRIEF

OPINIONS BELOW

The Supreme Court of Texas did not issue an opinion; its judgment appears in the Jurisdictional Statement Appendix ("J.S.A.") at 20a.

The opinion of the Texas Court of Civil Appeals, dated April 30, 1981, is reported at 619 S.W.2d 402, and is reprinted at J.S.A. 1a.

The opinion and the amended findings of fact and conclusions of law of the trial court, the District Court for the 165th District, Houston, Texas, dated July 14 and October 27, 1980, are not reported. They are reprinted at J.S.A. 11a-19a.

JURISDICTION

This is an appeal drawing in question the validity of state statutes which were challenged as being repugnant to the Constitution and were held to be valid.

It is an appeal from the decision of the Texas Court of Civil Appeals that the ad valorem taxes of appellees as applied to Xerox are valid and not prohibited by the Constitution of the United States. That decision was appealed to the Supreme Court of Texas, which found no reversible error in a judgment entered on October 14, 1981. J.S.A. 20a. It overruled a motion for rehearing on November 25, 1981. J.S.A. 21a. A notice of appeal to this Court was filed on February 1, 1982 in the Texas Court of Civil Appeals. J.S.A. 25a-27a. This appeal was docketed on February 9, 1982, within 90 days of the denial of rehearing below. Probable jurisdiction was noted on April 5, 1982. __ U.S. __ , 50 U.S.L.W. 3801. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2) (1976).

The Court has clearly established its jurisdiction over the issues raised here. In *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 440-41 (1979), it held

> In this case, appellants drew in question the validity of California's ad valorem property tax, contending that the tax, as applied to their containers, was repugnant to the Commerce Clause and various treaties, and the California Supreme Court sustained the validity of the tax. Under these circumstances, this Court's appellate jurisdiction would seem manifest.
>
> * * * Appellants squarely challenged the constitutionality of the tax statute, as applied, and the California Supreme Court just as squarely sustained its validity, as applied. We have held consistently that a state statute is sustained within the meaning of § 1257(2) when a state court holds it applicable to a particular set of facts as against the contention that such application is invalid on federal grounds. [citations] We conclude that we have appellate jurisdiction of this case.

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Article I, Section 8, Clause 3

> The Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

United States Constitution, Article I, Section 10, Clause 2

> No state shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws. . . .

Title 19, United States Code

> § 1555. Buildings or parts of buildings and other inclosures may be designated by the Secretary of the Treasury as bonded warehouses for the storage of imported merchandise entered for warehousing. . . . Except as otherwise provided in this chapter, bonded warehouses shall be used solely for the storage of imported merchandise and shall be placed in charge of a proper officer of the customs, who, together with the proprietor thereof, shall have joint custody of all merchandise stored in the warehouse. . . .
>
> § 1556. The Secretary of the Treasury shall from time to time establish such rules and regulations as may be necessary for the establishment of bonded warehouses and to protect the interests of the Government in the conduct, management, and operation of such warehouses and in the withdrawal of and accounting for merchandise deposited therein.
>
> § 1557.[1] (a) Any merchandise subject to duty . . . may be entered for warehousing and be deposited in a bonded warehouse at the expense and risk of the owner, importer,

---

1 As effective prior to October 3, 1978, the relevant time period.

or consignee. Such merchandise may be withdrawn, at any time within 3 years from the date of importation, for consumption upon payment of the duties and charges accruing thereon at the rate of duty imposed by law upon such merchandise at the date of withdrawal; or may be withdrawn for exportation or for transportation and exportation to a foreign country, or for shipment or for transportation and shipment to the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or the island of Guam, without the payment of duties thereon, or for transportation and rewarehousing at another port or elsewhere, or for transfer to another bonded warehouse at the same port. . . .

Texas Constitution, Article VIII, Section 1

Taxation shall be equal and uniform. All real property and tangible personal property in this State, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law. . . .

Vernon's Texas Civil Statutes, Article 7145

All property, real, personal or mixed, except such as may be hereinafter expressly exempted, is subject to taxation, and the same shall be rendered and listed as herein prescribed.

STATEMENT OF THE CASE

The facts in this case are simple and basically undisputed.

Xerox manufactures copying machines domestically and, through subsidiary corporations, also assembles them abroad. J.A. 14a, 23a; S.F. 49-50.[2] For reasons of good will and to more effectively compete in the sale of copiers in Latin America, Xerox set up an assembly plant in Mexico City, Mexico. The governments of Mexico, Brazil and other members of the Latin American Free Trade Association give import and tariff concessions to companies that have a plant facility in a member country; indeed, some countries deny import rights to manufacturers of copiers who do not have such a plant. Xerox had previously used the Panama Free Trade Zone to store copiers pending shipment to Latin America, but abandoned it due to anti-American feeling over the Panama Canal. Houston was chosen as the alternative location due, in part, to its excellent transportation facilities. J.S.A. 2a; Blanca dep. 25-28; S.F. 27-28, 41-42.

Most of the component parts of the copiers assembled at the Xerox plant in Mexico City were manufactured in the United States and shipped to Mexico for assembling. The parts were shipped from Rochester, New York, to Nuevo Laredo, Mexico, placed in Mexican customs bond and shipped to Xerox' plant. After being assembled for use in Latin America, the copiers were packaged individually and trucked to Nuevo Laredo, where they cleared Mexican customs. The copiers entered the United States at Laredo, Texas, where they were placed in the custody and control of the United States Customs Service ("U.S. Customs"). They were then shipped via a

---

2 Besides the materials contained in the appendices, under Texas procedure the record below consisted of a Statement of Facts and, pursuant to an order of the trial court, J.A. 46a, certain exhibits and depositions. Accordingly, reference is also made to the Statement of Facts ("S.F.") and the depositions of Mario A. Blanca ("Blanca dep.") and Ralph E. Benzaquen ("Benz. dep.").

customs bonded trucking company to the Houston Terminal Warehouse in Houston, Harris County, Texas, a Class 3 customs bonded warehouse. The copiers were placed in the warehouse, under U.S. Customs control and supervision, pending orders from affiliated Xerox corporations in Latin America. In the warehouse they were kept segregated from domestic goods. When an order was received, the goods were removed and transported by customs bonded trucks to either the Port of Houston or the Port of Miami, continuously under U.S. Customs control and supervision, where they were exported after first having cleared United States customs. J.A. 14a-15a; J.S.A. 16a-17a; S.F. 36-37, 42.

The goods in question were in the warehouse for varying periods of time, ranging from several days to twenty-five months. S.F. 29-31. All were in the warehouse for less than the period provided for by the customs statute then in force. No United States customs duty was ever paid on any of the machines. It is conceded by the appellees that the goods never left the supervision, custody and control of U.S. Customs. J.S.A. 17a; J.A. 14a. None of the copiers assembled in Mexico, including those in question, has ever entered the United States for domestic consumption, J.S.A. 3a, 17a, and as a practical matter, they could not.[3] Accordingly, Xerox

---

3 The copiers could not enter the United States because:

1. All printing and instructions were in Spanish and Portuguese (J.A. 30a);

2. Many of the machines required 50 cycle electricity, which is not readily available in the United States (S.F. 41);

3. Some of the machines did not have Underwriters Laboratory or Canadian Standards Association (UL/CSA) approval (J.A. 42a);

4. The copiers and their component parts were such that they could not participate in the Xerox "Retrofit" program in the United States, a program Xerox uses to continuously update copiers in service with improvements as they are developed (S.F. 47-48); and

5. Import would require paying customs duties of 5% of the value of the copiers and 5% of the value of technical assistance given to the Mexican operation, which assistance was worth in excess of $7 million (S.F. 43-44).

contends the machines were constantly in the flow of foreign commerce, and never entered the domestic commerce of the United States or became a part of the common mass of goods within the State of Texas.

Contrary to inferences made by the Texas Court of Civil Appeals, Xerox pays its way with respect to the services it receives from state and local governments. Indeed, in the City of Houston and County of Harris, Texas, Xerox paid ad valorem taxes of approximately $881,000 and $936,000 in 1976 and 1977, respectively, or a total of $1,817,000, on copiers (other than those in question) which were located in Texas for domestic use. S.F. 63-64. In addition, Xerox obviously has paid for the services of the common carriers who transported the goods and for the use of the warehouse, and those payments surely would have included a portion used by those entities to pay state and local taxes. Xerox also paid fees for the use of the Port of Houston. Benz. dep. 24.

Appellees did not assess ad valorem taxes on the machines stored under customs bond for the years 1974 or 1975. S.F. 63. In 1977, the City of Houston (on behalf of itself and the Houston Independent School District) and Harris County (on behalf of itself, the State of Texas and several other local taxing authorities) assessed ad valorem taxes for that year. Harris County also back assessed for the year 1976. J.A. 15a, 24a-26a. Harris County assessed taxes of $104,395.45 for the two years, while the City of Houston assessed $156,728.90 for 1977. J.S.A. 18a; J.A. 15a.

Xerox commenced this action for declaratory judgment and injunctive relief on September 30, 1977. In the earliest pleading filed, the original petition, Xerox alleged that the State and local ad valorem taxes in question were "unconstitutional, illegal and void" because they were in contravention of the Import-Export Clause and the Commerce Clause of the United States Constitution (art. I, § 10, cl. 2; art. I, § 8, cl. 3). J.S.A. 28a, 33a. The trial court, the 165th District Court for Harris County, Texas, upheld that claim and ruled that the taxes were

unconstitutional as applied to the foreign commerce in question: "[g]iven the peculiar status of the copiers in the factual context of foreign commerce, they are not taxable because they do not have a substantial nexus with Houston and have not left the palpable flow of foreign commerce." J.S.A. 11a-12a.

On appeal to the Texas Court of Civil Appeals, the same constitutional issues were raised when the appellees contended that the taxes were valid despite Xerox' constitutional challenge. That court reversed the trial court, holding that the taxes were valid and not prohibited by the Import-Export Clause, 619 S.W.2d at 405-06, J.S.A. 6a, and that they were not "repugnant to nor violative of the Commerce Clause of the United States Constitution". 619 S.W.2d at 407, J.S.A. 8a.

In its Application for Writ of Error to the Supreme Court of Texas, appellant claimed, *inter alia*, that the Court of Civil Appeals had erred in holding these taxes constitutionally valid. The Supreme Court of Texas considered that claim, but found "no reversible error." J.S.A. 20a.

SUMMARY OF ARGUMENT

I. *The Commerce Clause*

a) These State ad valorem taxes on copiers stored in a customs bonded warehouse violate the mandate of the Commerce Clause of the Constitution, art. I, § 8, cl. 3, that only Congress has the power to "regulate Commerce with foreign Nations". This Court will make a more extensive constitutional analysis when foreign rather than domestic commerce is involved, and in doing so the Constitution requires that the Court examine the *national* interest rather than that of any individual state. *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 448 (1979).

b) In its regulation of foreign commerce, Congress has created a comprehensive system of customs bonded warehouses where, during the relevant time period, it permitted storage of goods free of customs duties for up to three years

(now five), and no duty need be paid if the goods were reexported. 19 U.S.C. § 1557(a) (1976).

Its legislative purpose was twofold. First, Congress sought to alleviate the tax burden on the importer by permitting him to pay tariffs gradually as goods periodically entered the domestic market from the warehouse, rather than requiring one large payment for duties when the merchandise landed, as had previously been the case. Congress also sought to encourage and increase foreign commerce by permitting the importer to accumulate and store goods not destined for domestic commerce in the warehouse, and then to reexport them duty free at the most advantageous time.

Such goods are continuously in the possession, custody and control of U.S. Customs; they do not become part of the common mass of property within the State, but rather remain in foreign commerce.

Congress specifically delegated the regulation of bonded warehouses to the Secretary of the Treasury, who in conformity with its intent has promulgated regulations exempting goods stored there from state process and taxes.

c) In *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414 (1940), this Court struck down a state tax on goods in a bonded warehouse as an unconstitutional interference with Congress' comprehensive regulation of foreign commerce. *McGoldrick* is indistinguishable from the instant situation and should be adhered to.

II. *The Import-Export Clause*

These taxes also constitute "Imposts or Duties on Imports or Exports" imposed by a State in violation of the Import-Export Clause of the Constitution, art. I, § 10, cl. 2. In *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), the Court said that state taxes on goods that are "in transit" and not part of the common mass of property in the State are unconstitutional.

Since Xerox' copiers were continuously in the custody of U.S. Customs, appellees' taxes were unconstitutional because

the copiers had not become part of the common mass of goods in Texas, and were still "in transit" in foreign commerce.

One of the criteria the Court enunciated in *Michelin* to test if a state tax violates the Import-Export Clause is the requirement that the federal government "speak with one voice" in regulating foreign commercial relations. These taxes fail that test. The federal government cannot speak with one voice if each state is permitted to make its own separate, unilateral decision as to what taxes it will impose on goods merely passing through the state on a continuous journey from one foreign country to another.

ARGUMENT

I

THE COMMERCE CLAUSE

Constantly under the rigid supervision of U.S. Customs, and clearly "in transit" in foreign commerce, Xerox' copiers never entered the domestic commerce of the United States or the common mass of property within the State of Texas; nevertheless the court below held local ad valorem taxes applicable to them. That holding must be weighed against the constitutional mandate of the Commerce Clause, art. I, § 8, cl. 3, giving Congress the "power . . . To regulate Commerce with foreign Nations . . . . "

A. Foreign Commerce

When it regulates tariffs and customs warehouses, Congress regulates *foreign* commerce, and its power to do so

> is exclusive and plenary. As an exclusive power, its exercise may not be limited, qualified or impeded to any extent by state action. [citations] The power is buttressed by the express provision of the Constitution denying to the States authority to lay imposts or duties on imports or exports without the consent of Congress. Art. 1, § 10, ¶ 2.

> . . . . The principal of duality in our system does not touch the authority of the Congress in the regulation of foreign commerce.

Board of Trustees v. United States, 289 U.S. 48, 56-57 (1933).

In regulating foreign commerce, Congress' paramount consideration is the *national* interest, and not that of any individual state. *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 448 (1979); *Epstein v. Lordi,* 261 F.Supp. 921, 931 (D.N.J. 1966), *aff'd,* 389 U.S. 29 (1967). When considering state property taxes under the Commerce Clause, this Court rejected the notion that the constitutional analysis is the same regardless of whether domestic or foreign commerce is involved; "[w]hen construing Congress' power to 'regulate Commerce with foreign Nations,' a more extensive constitutional inquiry is required." *Japan Line, Ltd. v. County of Los Angeles, supra* at 446.

That analysis must begin here with the customs bonded warehouse.

B. Customs Bonded Warehouses

What distinguishes this case is the customs bonded warehouse, such as the one in which Xerox' copiers were stored. This Court rejected state tax interference with them in *McGoldrick v. Gulf Oil Corp.,* 309 U.S. 414 (1940), and it has consistently refused to countenance other state restrictions on their operation.[4] Therefore, it is important to recall their role in the foreign commerce of the United States, and *why* they exist.

---

4 See, e.g., *Hostetter v. Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324 (1964), and *Ammex Warehouse Co. v. Dep't of Alcoholic Beverage Control,* 224 F.Supp. 546 (S.D.Cal. 1963), *aff'd,* 378 U.S. 124 (1964), where state attempts to regulate liquor in customs bonded warehouses were held to be unconstitutional interferences with foreign commerce.

In one form or another, customs bonded warehouses have been part of Congress' regulation of foreign commerce since earliest times,[5] and with slight modifications have remained basically the same since 1846.[6] They are part of a comprehensive regulatory scheme, including tariff duties on imported goods and numerous regulations to be administered by U.S. Customs, and "[t]he purpose to regulate foreign commerce permeates the entire congressional plan." *Board of Trustees v. United States,* 289 U.S. 48, 58 (1933). More specifically, Congress has authorized eight different classes of customs bonded warehouses, 19 U.S.C. § 1555 (1976), and provided that merchandise can be brought to the borders of the United States and delivered to the supervision and control of U.S. Customs for storage in them. The merchandise can then be withdrawn into the United States or reexported, and if reexported, it is not subject to customs duties. During the relevant time period, goods could remain in a customs bonded warehouse for three years without the payment of taxes or duties. 19 U.S.C. § 1557(a) (1976).[7] Every aspect of the manner in which the warehouses are conducted is rigidly controlled. See 19 C.F.R. §§ 19.1-19.6 (1981).

---

5 For their history between 1799 and 1877 see *Fabbri v. Murphy,* 95 U.S. 191 (1877).

6 See, e.g., Warehousing Act of 1846, ch. 84, 9 Stat. 53 (1846); Act of March 28, 1854, ch. 30, § 4, 10 Stat. 270, 271 (1854); Act of September 21, 1922, ch. 356, Title IV, Part 4, 42 Stat. 858, 977 (1922); Tariff Act of 1930, ch. 497, Part IV, 46 Stat. 590, 744 (1930); Act of June 25, 1938, ch. 679, 52 Stat. 1077, 1087 (1938); Customs Procedural Reform and Simplification Act of 1978, Pub.L.No. 95-410, § 108, 92 Stat. 888, 892 (1978).

7 In 1978 Congress extended that freedom from taxation by increasing the period of time goods could be stored from three years to five years, Customs Procedural Reform and Simplification Act of 1978, Pub.L.No. 95-140, § 108, 92 Stat. 888, 892 (1978), because it would "serve a useful commercial purpose". S. REP. NO. 778, 95th Cong., 2d Sess. 16 (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 2211, 2227.

1. *Freedom From Taxation*

In 1846 Congress created a comprehensive system of customs bonded warehouses for all products in the Warehousing Act, 9 Stat. 53 (1846), including a proviso that "the collector and naval officer, if any, on an entry to reexport the same, shall, upon payment of the appropriate expenses, permit the said goods, under the inspection of the proper officers, to be shipped without the payment of duties thereon."

The legislative history of the Act makes clear its purpose to "unfetter commerce". H.R. REP. NO. 411, 26th Cong., 1st Sess. 2 (1846). To relieve businessmen's capital requirements, warehouses were created where imported goods could be deposited without payment of duties for up to three years, and withdrawn for domestic consumption upon the payment of the duties, or reexported duty free. The tax burden was alleviated because duties need only be paid on a gradual basis as the goods were periodically removed into domestic markets, rather than in one large payment when the goods landed, as had previously been the case. *Id.;* App. to CONG. GLOBE, 29th Cong., 1st Sess. 791-92 (1846). This legislation reinstated

> the sound though long neglected maxim of Adam Smith, "That every tax ought to be levied at the time and in the manner most convenient for the contributor to pay it;" because it provides that the tax shall only be paid when the imports are entered for consumption. . . .

H.R. REP. NO. 411, 26th Cong., 1st Sess. 3 (1846).

The Act's second purpose was to encourage foreign trade and the shipping industry by allowing foreign goods to accumulate in the warehouses and then be reexported without the imposition of tariffs. Congress believed this would allow American ports to become important centers for the transshipment of foreign goods, and would encourage domestic goods becoming part of the outbound shipment. Congress concluded "that the industry of our seaports would be put in greater activity; that the commercial transactions of the country would

be facilitated; and that a healthier competition would be created in the business of importation. . . ." App. to CONG. GLOBE, 29th Cong., 1st Sess. 792 (1846).[8]

2. *Goods Remain in Government Control and Therefore Foreign Commerce*

Until the duty has been paid, the goods are in the possession, custody and control of the United States Government. Indeed, in passing the Warehousing Act, Congress specifically said that while in bonded warehouses, the goods are "to be in the possession of the collector, or, in other words, in the possession of the Government." App. to CONG. GLOBE, 29th Cong., 1st Sess. 793 (1846). U.S. Customs' continuous supervision and control over Xerox' copiers is conceded in this case. J.A. 12a, 15a.

The courts have consistently concurred that until the goods pass the legal barrier of payment of customs duties, they are in foreign commerce as surely as if they had remained aboard ship. Judge Learned Hand considered goods in customs bond to be as if "detained at the borders". *United States v. Ehrgott,* 182 F. 267, 273 (C.C.S.D.N.Y. 1910). In *Ammex Warehouse Co. v. Department of Alcoholic Beverage Control,* 224 F.Supp. 546, 555-56 (S.D.Cal. 1963), *aff'd,* 378 U.S. 124 (1964), a three judge court held liquor in customs bond not subject to state regulation because, while the purchaser might have possession, "the goods are 'in bond' or under control of U.S. Customs until the movement of export. They never become part of the common mass of goods in the State." And in *District of Columbia v. International Distributing Corp.,* 331 F.2d 817, 819-20 (D.C. Cir. 1964), the court affirmed the following language of the U.S. Tax Court as being in clear accord with congressional intent:

---

8 Congress was also concerned with the effect of the increased capital expense of the importer on the domestic consumer, to whom the importer had to pass along the incremental tariff burden. See H.R. REP. NO. 411, 26th Cong., 1st Sess. 2 (1846).

> "The idea of bonded warehouses and their use by the United States custom authorities negatives the proposition that at the time of sale the alcoholic beverages were in the possession of the petitioner [the corporation]. True it is that the private bonded warehouse was physically in the District of Columbia; and the liquors were stored therein; and in that sense they were in the District. In law, however, they were still without that jurisdiction, and did not become subject thereto until they had been withdrawn from the private bonded warehouse and removed from the control of the customs official. . . ."

See also *Stone & Downer Co. v. United States,* 19 C.C.P.A. 259 (1931).

These decisions merely echo this Court's holding that such goods are in foreign commerce; in *Fabbri v. Murphy,* 95 U.S. 191, 197-98 (1877), the Court said, in reviewing the legislative history of bonded warehouses:

> Throughout those provisions, the plain inference is that Congress did not regard the importation as complete while the goods remained in the custody of the proper officers of the customs.

3. *Treasury Regulations Against State Taxation*

Since 1846, 9 Stat. 53 at 55 (1846), Congress has delegated to the Secretary of the Treasury power to formulate "such rules and regulations as may be necessary for the establishment of bonded warehouses and to protect the interests of the Government. . . ." See 19 U.S.C. § 1556 (1976).[9] Pursuant to that

---

9 "It has been thought proper to put [the bill] in the most simple form possible, and to rely mainly for carrying into effect the new provisions it contains on regulations to be framed by the Treasury Department. . . . The Secretary of the Treasury is, therefore, authorized to make such regulations, not inconsistent with the laws of the United States, as may be necessary to give full effect to the provisions of the act." App. to CONG. GLOBE, 29th Cong., 1st Sess. 792 (1846).

mandate, the Secretary has formulated detailed regulations concerning customs bonded warehouses, including one that adopted the *McGoldrick* decision, stating that "imported goods in bonded warehouses are exempt from taxation or judicial process of any state or subdivision thereof." 19 C.F.R. § 19.6(c) n.11 (1981). This is substantially the same as language that has appeared in customs regulations since 1915, *McGoldrick*, 309 U.S. at 426, and those regulations have the force of law. *United States v. Ehrgott*, 182 F. 267, 272 (C.C.S.D.N.Y. 1910) (L. Hand, J.); *Wells Fargo Nevada Nat. Bank v. Haslett Warehouse Co.*, 60 Cal. App. 225, 212 P. 647, 648 (1923).

C. State Taxation of Goods In Customs Bonded Warehouses Prohibited—The McGoldrick Case

Against this background, this Court decided *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414 (1940), and rejected state taxation of goods located in a customs bonded warehouse.

In *McGoldrick*, the City of New York attempted to impose a sales tax on crude petroleum imported from Venezuela, processed into fuel oil in New York, and then sold for export, usually to ships bound for other countries. The operation was in a customs bonded warehouse, and, as here, the goods were always segregated from the common goods in the State, and never destined for domestic commerce. *Id.* at 429. The Supreme Court reviewed the federal government's refusal to permit taxation of products under customs bond and struck down the attempted local taxation as repugnant to the Commerce Clause.

The Court identified comprehensive customs statutes and regulations which "taken together operate as regulations of foreign commerce, as legislative history shows they intended to do". *Id.* at 427. The Court referred to § 311 of the Tariff Act of 1930, ch. 497, 46 Stat. 590, 691, 19 U.S.C. § 1311 (1976), which "provided for the manufacture in such warehouse of articles made from imported materials and intended for exportation free of duty under such regulations as the Secretary of

the Treasury might prescribe. . . ." *Id.* at 424 n.3. The Court then noted a Customs regulation providing that "merchandise in bonded warehouse is not subject to levy, attachment, or other process of a State court. . ." and that "imported goods in bonded warehouse are exempt from taxation under the general laws of the several States." *Id.* at 426. That regulation was in force when the Tariff Act of 1930 was adopted and was incorporated by reference. In language that is controlling here, the Court concluded that this

> congressional regulation, read in the light of its purpose, is tantamount to a declaration that in order to accomplish constitutionally permissible ends, the imported merchandise shall not become a part of the common mass of taxable property within the state . . . and shall not become subject to the state taxing power. *Id.* at 429.

Appellees and the court below offer several reasons for refusing to follow *McGoldrick*. We submit they are all without merit.

First they attempt to distinguish the Treasury regulation barring state taxes referred to in *McGoldrick* (now codified in 19 C.F.R. § 19.6(c) n.11 (1981)). They point to cases contained in a marginal note to the regulation, including *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1872), and claim that because the *Low* case was overruled in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), the regulation somehow falls.[10] Even if the fate of a

---

10 The court below said that "[t]his footnote is not a regulation and as pointed out in [*American Smelting & Refining Co. v. County of Contra Costa*, 271 Cal. App. 2d 437, 77 Cal. Rptr. 570, *appeal dismissed*, 396 U.S. 273 (1969)], *Michelin* overruled *Low* and the footnote has no more weight than the precedent upon which it rests." J.S.A. 7a. But *American Smelting* said nothing about *Michelin* overruling *Low*, since *Michelin* was not even decided until seven years after *American Smelting*. And *American Smelting* did not say that it was any less controlling because it was a footnote; what it did conclude was that it meant "that imported goods which are entitled to constitutional protection are exempt from state and local taxation while in a bonded warehouse." 271 Cal. App. 2d at 598 n. 28.

case appearing in an annotation could somehow change the unambiguous language of the regulation (and that is akin to claiming that when a case listed in United States Code Annotated is overruled, the statute it is listed under is invalidated as a result), what happened to *Low v. Austin* is irrelevant, because it did not relate to goods in government custody in a bonded warehouse. And while the Treasury regulation is controlling in its own right, see *supra* at 15-16, its real significance here is that it restates Congress' determination that bonded warehouses should be "unfettered" by state taxation. Since 1846, Congress intended that goods in bonded warehouses be free of tax burdens, whether customs duties or state property taxes, until they enter the state for domestic consumption or are reexported. That purpose, which permeates the legislative history, is merely codified by the Treasury regulation. Congress' regulation of foreign commerce did not fall with *Low v. Austin*.

The factual distinctions drawn by the appellees and the court below between this case and *McGoldrick* do not create a difference. These are property taxes rather than a sales tax, but they still place an unconstitutional burden on federally regulated foreign commerce. And while *McGoldrick* focused on the regulation of petroleum imports and exports and their use as ships' stores, those regulations were part of the same overall control of foreign commerce at issue here. The court below erred when it said that "no comparable legislation has been enacted that would prohibit taxation" of goods in a storage warehouse. J.S.A. 7a. Actually, besides enacting the provisions as to manufacturing warehouses referred to in *McGoldrick*, the 1930 Tariff Act reincorporated the provisions of the Warehousing Act of 1846 and its progeny—again freeing goods in storage warehouses from duties and delegating to the Secretary of the Treasury the power to regulate those warehouses. 46 Stat. 590, 743, 744 (1930); 19 U.S.C. §§ 1556, 1557(a) (1976). And as noted above, pursuant to that authority, the Secretary promulgated regulations prohibiting state taxation. Therefore customs legislation is no less pervasive for

stored goods than for manufactured goods, and is designed to protect *all* goods located in customs bonded warehouses, including Xerox' copiers. 15 U.S.C. §§ 1556, 1557(a) (1976).

Appellees rely on *American Smelting & Refining Co. v. County of Contra Costa, supra* note 10, but there State ad valorem taxes were rejected when, as here, the merchandise in question (ore) was destined for foreign commerce. 77 Cal. Rptr. at 601. And they ignore *National Distillers Products Corp. v. City and County of San Francisco,* 141 Cal. App. 2d 651, 297 P.2d 61, *cert. denied,* 352 U.S. 928 (1956), where the State sought to enforce ad valorem taxes on goods other than petroleum (liquor) stored in a customs bonded warehouse. That court held the taxes unconstitutional in light of *McGoldrick* and rejected claims that the goods were subject to taxation, because they

> derive their immunity from local taxation under the commerce clause by reason of the fact that the federal government has regulated their manufacture, transportation, storage, and exportation in furtherance of commerce, and that such taxes would constitute an interference with that regulation. *Id.* 297 P.2d at 66.

Whether the product involved is the oil in *McGoldrick,* National Distillers' liquor, American Smelting's ore or Xerox' copiers, Congress' regulation of foreign commerce is no less complete. Congress intends that *all* products be free of *all* taxation until they enter the United States for consumption, or are reexported.

Finally, appellees and the court below express concern that these copiers should help pay for State services, and that the courts should not deprive the State of that revenue. This, of course, ignores myriad indirect taxes Xerox pays, such as through fees to the common carriers, to the warehousemen, and for the use of the Port of Houston. And if these goods had been destined for domestic consumption, the moment they left federal custody and passed through the door of the warehouse into domestic commerce, the State could claim its tax. But

while this Court has noted that the states' needs are not without weight, it concluded in *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 457 (1979), that where the tax is in violation of the Commerce Clause, these arguments

> are directed to the wrong forum . . . .The problems to which appellees refer are problems that admit only of a federal remedy. They do not admit of a unilateral solution by a State.

Precedent clearly establishes that these taxes violate the Commerce Clause. To affirm here would require a rejection of *McGoldrick,* but we submit that it is alive, viable, and controlling. Nothing has happened since *McGoldrick* to impel the conclusion that there has been a change in congressional regulation of foreign commerce or in the Constitution so that they now conflict with it. Accordingly, the decision of the lower court should be rejected.

II

IMPORT-EXPORT CLAUSE

Even if the Court concludes that the State may enter the federal enclave and tax goods in the custody of the United States Government without violating the Commerce Clause, the constitutional analysis must continue, because the Constitution does not permit a state to "lay any Imposts or Duties on Imports or Exports. . . ." U.S. CONST. art I, § 10, cl. 2.

A. State Property Taxation of Goods "In Transit" Prohibited—The Michelin Case

Inquiry concerning the validity of a state tax under the Import-Export Clause necessarily begins with *Michelin Tire Corp. v. Wages,* 423 U.S. 276 (1976) ("*Michelin*"). Michelin had imported tires and tubes from abroad, cleared United States customs and paid duty. It then trucked them to its

warehouse in Georgia, where they were unloaded, sorted and stored, awaiting orders from dealers. They were not in a customs bonded warehouse and were destined for domestic sale. Before *Michelin*, the cases followed the "original package" test, holding that as long as the imported product remained in its original package, it was still in foreign commerce and not subject to local taxation.[11] The Court concluded in *Michelin* that the "original package" test was not solely determinative, but stated that imports were *not* subject to local taxation as long as they were "in transit."

The Court said that a state tax would also violate the Import-Export Clause if it offended *any* of three policy considerations; namely, that 1) the federal government must speak with one voice in regulating foreign commercial relations; 2) import revenue of the federal government cannot be diverted to the states; or 3) harmony among the states might be disturbed unless states with ports of entry were prohibited from taxing goods merely flowing through their ports. *Id.* at 285-86.

While appellees' taxes fail to satisfy the first test and are invalid,[12] the fact is the Court said in *Michelin* that the Constitution prohibits "the assessment of even nondiscriminatory property taxes on goods which are merely in transit through the State when the tax is assessed." *Id.* at 290. See also 423 U.S. at 286 and 302. Xerox' goods were in transit and therefore never became part of the common mass of goods within the State which would be subject to taxation.[13]

---

11 *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827); *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1872); *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945); and *Youngstown Sheet & Tube Co. v. Bowers*, 358 U.S. 534 (1959).

12 The third criterion also would have been violated had any Xerox copier gone into domestic commerce, but Xerox does not argue that point since it is factually inapplicable.

13 Two year later, in *Dep't of Revenue v. Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978), the Court extended

B. Xerox' Copiers Were "In Transit"

The court below said that Xerox' copiers were not "in transit." In one place, the criteria it identified to decide whether they were "in transit" were: a) was there stoppage; b) was the final destination determinable; and c) was it for the business purpose of the shipper.[14] At another point the court reasoned that under *Kosydar v. National Cash Register Co.*, 417 U.S. 62 (1974), the goods were not immune from taxation because export had not started. And finally the court claimed that State taxes could be applied where the goods were imported and warehoused at the owner's convenience until a sale was obtained and the goods were reexported.[15]

The significant feature absent in *all* of the cases cited below is the customs bonded warehouse. Appellees have conceded that Xerox' goods never left the supervision, custody and control of U.S. Customs, and were always kept in facilities where, pursuant to federal regulation, 19 C.F.R. § 19.2(c) (1981), they were carefully segregated from domestic commerce. And it is also conceded that they never entered domestic commerce, but were shipped abroad. It is only if, as, and when Xerox paid the required customs duties that these goods would

---

Michelin and approved State taxation of interstate stevedoring activities, but noted that the tax was on an *activity* and not the *goods* themselves. The Court explained "that the Michelin policy analysis should not be discarded merely because the goods are in transit, at least where the taxation falls upon a service distinct from the goods and their value." *Id.* at 757. It said, however, that it was not deciding the "applicability of the *Michelin* approach when a State directly taxes imports or exports in transit." *Id.* at n.23. But as discussed *infra* at 24-25, even if the Court applies the *Michelin* test to goods in transit, it just confirms that the taxes are unconstitutional.

14 The court cited *Independent Warehouses, Inc. v. Scheele*, 331 U.S. 70 (1947); *Michelin Tire Corp. v. Wages, supra;* and *Calvert v. Zanes-Ewalt Warehouse, Inc.*, 502 S.W.2d 689 (Tex. 1973).

15 *Bacon (Wabash Elevator) v. Illinois*, 227 U.S. 504 (1913); *Susquehanna Coal Co. v. City of South Amboy*, 228 U.S. 665, (1913); and *Michelin Tire Corp. v. Wages, supra,* were cited.

leave federal premises and enter the common mass of goods within the State. Until then, they were as surely in foreign commerce and beyond the reach of State taxation as if they had remained on the loading dock in Mexico City. On the other hand, in all of the cases cited by the court below, the importation or interstate journey had ceased or the export journey had not yet begun. Therefore the goods had settled into the common mass of property within the State and had some connection with it for taxation purposes. Here, however, they were in federal custody and had not become part of the State's common mass of property. In short, they had no nexus with the State of Texas.

Congress decided that these goods could remain in the customs bonded warehouse for three years (now five) without the imposition of duty; if transshipped, no duty applied. 19 U.S.C. § 1557(a) (1976). Whatever period of time it chose, Congress has stated the permissible span the goods may remain in foreign commerce, and it is for Congress, and not local taxing authorities, to determine the indicia of foreign commerce. *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979). However long they stayed, they were always in federal custody, bound for foreign destinations.

Case law confirms that customs bonded merchandise is treated as though still on its foreign journey. As discussed *supra* at 14-15, it was as if Xerox' copiers had been "detained at the borders", *United States v. Ehrgott,* 182 F. 267, 273 (C.C.S.D.N.Y. 1910), had "never become part of the common mass of goods in the State", *Ammex Warehouse Co. v. Department of Alcoholic Beverage Control,* 224 F.Supp. 546, 555 (S.D.Cal. 1963), *aff'd,* 378 U.S. 124 (1964), and in law "were still without that jurisdiction, and did not become subject thereto until they had been withdrawn from the private bonded warehouse and removed from the control of the customs official." *District of Columbia v. International Distributing Corp.,* 331 F.2d 817, 820 (D.C. Cir. 1964). Over a century ago, this Court said in *Fabbri v. Murphy,* 95 U.S. 191, 197-98 (1877), that "the plain inference is that Congress did

not regard the importation as complete while the goods remained in the custody of the proper officers of the customs."

Xerox' copiers were obviously still "in transit."

C. State Taxation of Goods "In Transit" Prevents the Federal Government from Speaking With One Voice on Foreign Commerce

While the Court flatly said in *Michelin* that goods in transit are immune from state ad valorem taxation, 423 U.S. at 290, even if the next step is taken and the taxes are analyzed under the *Michelin* criteria, *Department of Revenue v. Association of Washington Stevedoring Companies,* 435 U.S. 734, 757 n.23 (1978), they are still patently offensive to the Constitution.

Since Xerox' copiers concededly never continued on to other states, but were always in *foreign* commerce, analysis must focus on the first of the three criteria enumerated in *Michelin* for determining prohibited taxes, namely, that

> the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power. . . . *Id.* at 285-86.

The federal government has certainly regulated foreign commercial relations concerning goods passing through customs bonded warehouses for reexport—it has said they are not to be subject to taxes or customs duties. See 19 U.S.C. § 1557(a) (1976). Texas seeks to interject itself as to those goods, however, and claims the right to speak on foreign commercial relations for goods that happen to be warehoused there and to say that it can burden them with its taxes. But that is just what the Constitution prohibits.

This Court's analysis in *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979), is precisely in point. There the State of California sought to assess ad valorem taxes on

appellant's cargo containers. The Court said that its constitutional analysis must be more extensive where foreign commerce is involved, *id.* at 446, and while focusing on a Commerce Clause challenge, noted that the "policies animating the Import-Export Clause and the Commerce Clause are much the same", *id.* at 449 n.14; it therefore analyzed the case under the *Michelin* criteria. The Court held that "California's tax prevents this Nation from 'speaking with one voice' in regulating foreign trade." *Id.* at 452.[16] It noted a national policy to remove impediments to the use of containers, similar to Congress' policy to "unfetter" goods passing through customs bonded warehouses:

> California's tax, however, will frustrate attainment of federal uniformity. . . . If other States follow California's example (Oregon already has done so), foreign-owned containers will be subjected to various degrees of multiple taxation, depending on which American ports they enter. This result, obviously, would make "speaking with one voice" impossible. California, by its unilateral act, cannot be permitted to place these impediments before this Nation's conduct of its foreign relations and its foreign trade. *Id.* at 453.

So, too, if the various states are permitted to assess diverse property taxes on goods passing in transit through the nation's customs bonded warehouses, the purpose of the Import-Export Clause would be frustrated, and it "would make 'speaking with one voice' impossible." Accordingly, applying appellees' taxes to goods on a continuous foreign journey violates the basic reasons for the Import-Export Clause enunciated in *Michelin*, and the taxes should be stricken.

---

16 The Court also held the tax unconstitutional because, notwithstanding its apportionment, it created a substantial risk of international tax multiplication. *Id.* at 446, 451. While the same would be true with respect to appellees' taxes as applied to foreign owned goods, Xerox does not argue this point because it is not factually applicable to its copiers.

CONCLUSION

These state property taxes constitute an unconstitutional impingement on both the Commerce and Import-Export Clauses. If each of the 50 states were allowed to make its own individual determination of what burdens it will place on goods in bonded warehouses within its borders, it would create chaos which would quite literally destroy a national system Congress has nurtured and protected for 136 years. We submit that it should not be permitted. Accordingly, it is respectfully urged that this case be reversed and remanded to the lower court for the entry of judgment declaring that these taxes are unconstitutional as applied to Xerox' copiers, enjoining their assessment, dismissing the counterclaims of appellees, and granting costs and such other relief as is proper.

Respectfully submitted,

ALFRED H. HODDINOTT, JR.
800 Long Ridge Road
Stamford, Connecticut 06904
(203) 329-8700

Counsel for Appellant

May 19, 1982

Appellee's Brief

1

rt, U.S.
D
JUL 23 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-1489

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

XEROX CORPORATION,
Appellant,

v.

COUNTY OF HARRIS, TEXAS and
CITY OF HOUSTON, TEXAS,
Appellees.

On Appeal From The Texas Court of Civil Appeals

BRIEF FOR APPELLEE COUNTY OF HARRIS

MICHAEL H. DRISCOLL
County Attorney

JOHN J. GREENE
Assistant County Attorney
1001 Preston, Suite 634
Houston, Texas 77002
(713) 221-5101

Counsel for Appellee
County of Harris, Texas

July 22, 1982

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

QUESTIONS PRESENTED

May a state assess an ad valorem tax on goods that could have entered domestic commerce with minor modification, paused for two-and-one-half years within the state, were not physically committed to the export stream, and were stored in a United States Customs bonded warehouse for the convenience of the importer?

In addition to the question specified in the appellant Xerox's brief, it is appellee Harris County's view that there is also a second question presented, namely:

Is the appellant Xerox's attack on state tax law too abstract to bring finality to the controversy herein?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
INDEX OF AUTHORITIES	III
STATEMENT	1
ARGUMENT	3
I. The United States Supreme Court lacks jurisdiction of this cause because of an independent state ground of decision	8
II. Imported goods stored in a United States customs bonded warehouse are not exempt from state and local taxation under the Import/Export clause.	13
A. The Original Package Doctrine has been overruled.	13
B. Goods which have not physically entered the export stream are not "in transit" though stored in a customs bonded warehouse.	17
III. The Commerce Clause does not exempt goods stored in a customs bonded warehouse from state and local taxation.	21
A. The tax at issue herein does not impose an undue burden on interstate commerce.	22
B. The tax at issue herein does not interfere with foreign commerce.	24
C. The Congress has not exempted Xerox's copiers from state and local taxation.	26
1. The *McGoldrick* case is distinguishable	27
2. A Treasury Regulation footnote citing *McGoldrick* is based on the overruled Original Package Doctrine	34
CONCLUSION AND PRAYER	36

INDEX OF AUTHORITIES

CASES	Page
American Smelting and Refining Company v. County of Contra Costa, 77 Cal. Rptr. 570 (Ct. App. 1969) appeal dism. 396 U.S. 273, 90 S.Ct. 553	31, 32, 33, 35
Bacon v. Illinois, 227 U.S. 504, 33 S.Ct. 299, 57 L.Ed. 615 (1913)	19, 24
Blount v. Munroe, 60 Ga. 61 (Ga. 1878)	35
Brown v. Houston, 114 U.S. 622, 5 S.Ct. 1091, 29 L.Ed. 257 (1885)	22
Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 6 L.Ed. 678 (1827)	13, 14, 15, 22, 23
City of Farmers Branch v. Matsushita Electric Corporation of America, 537 S.W.2d 452 (Tex. 1976)	20
Clarke v. Clarke, 3 Woods 408, 5 Fed. Cas. 943 (S.D. Georgia 1877)	35
Corex Corporation v. United States of America, 454 F. Supp. 835 (C.D. Calif. 1978)	7
David Graham Hall Foundation v. Highland Park I.S.D., 371 S.W.2d 762 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.)	11
Davies v. Meyer, 541 S.W.2d 827 (Tex. 1976)	11
Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies, 435 U.S. 734, 98 Sup. Ct. 1388, 55 L.Ed.2d 682 (1978)	6, 17, 19, 21, 22, 25, 26
Eastex Wildlife Protective Association v. Jasper, et al., County Dog and Wildlife Protection Association, 450 S.W. 2d 904 (Tex. Civ. App.—Beaumont 1970, writ ref'd n.r.e.)	10
Electra I.S.D. v. W. T. Waggoner Estate, 140 Tex. 483, 168 S.W.2d 645 (1943)	11
Epstein v. Lordi, 261 F.Supp. 921 (D.N.J. 1966), aff'd, 389 U.S. 29 (1967)	4, 7
Fabbri v. Murphy, 95 U.S. 191, 24 L.Ed. 468 (1877)	4
Firemen's Insurance Company of Newark, New Jersey v. Burch, 442 S.W.2d 331 (Tex. 1968)	11, 12
Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824)	22
Grayson County Officials v. Dennard, 574 S.W.2d 179 (Tex. Civ. App.—Eastland 1978, writ ref'd. n.r.e.)	10
Hartranft v. Oliver, et al, 125 U.S. 525, 8 S.Ct. 958, 31 L.Ed. 813 (1888)	5
Hicks v. Young, 553 S.W.2d 1 (Tex. Civ. App.—Eastland 1977, aff'd. in part 559 S.W.2d 343)	10
Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 84 S.Ct. 1293, 12 L.Ed.2d 350 (1964)	7

CASES

	Page
Independent Warehouses v. Scheele, 331 U.S. 70, 67 S.Ct. 1062, 91 L.Ed. 1346 (1947)	19, 24
Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979)	7, 25, 26
J. Henry Schroder Banking Corp. v. Schultz, 373 F.Supp. 1283 (S.D. Tex. 1974)	7
Kosydar v. National Cash Register Co., 417 U.S. 62, 94 Sup. Ct. 2108, 40 L.Ed.2d 660 (1974)	19
Lawrence v. Allen, 48 U.S. (7 Howard) 785, 12 L.Ed. 914 (1849)	4
Low v. Austin, 80 U.S. (13 Wall) 29, 20 L.Ed. 517 (1872)	6, 15, 21, 23, 35
McGoldrick v. Gulf Oil Corporation, 309 U.S. 414, 60 S.Ct. 664, 84 L.Ed. 840 (1940)	3, 4, 27, 29, 30, 31, 32, 34, 35, 36
M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819)	22
Michelin Tire Corporation v. Wages, 423 U.S. 276, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976)	6, 7, 16, 17, 18, 19, 20, 21, 24, 26, 31, 34, 35, 36
Mobil Oil Corporation v. Commissioner of Taxes of Vermont, 445 U.S. 425, 100 S.Ct. 1223, 63 L.Ed.2d 510 (1980)	25, 30
Orange I.S.D. v. West Orange I.S.D., 390 S.W.2d 81 (Tex. Civ. App.—Beaumont 1965, writ ref'd. n.r.e.)	13
Orr v. Orr, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979)	8
Osborne v. Boys Harbor, Inc., 462 S.W.2d 419 (Tex. Civ. App.—Houston [1] 1970, no writ hist.)	11
Republic Ins. Co. v. Highland Park I.S.D., 141 Tex. 224, 171 S.W.2d 342 (1943)	11
Rescue Army v. Municipal Court, 331 U.S. 549, 67 S.Ct. 1409, 91 L.Ed. 1666 (1947)	9
River Oaks Garden Club v. City of Houston, 370 S.W.2d 851 (Tex. 1963)	11
Roberts v. Southwestern Life Ins. Co., 244 S.W.2d 302 (Tex. Civ. App.—Dallas 1951, writ ref'd. n.r.e.)	12
State ex rel. Rhett v. Pinckney, (1857) 10. Rich L. 474	35
Stone & Downer Co. v. United States, 19 C.C.P.A. 259 (1931)	4, 5
Susquehanna Coal Co. v. City of South Amboy, 228 U.S. 665, 33 S.Ct. 712, 57 L.Ed. 1015 (1913)	19, 24
United States v. Ehrgott, 182 F. 267 (C.C.S.D.N.Y. 1910)	4
Villalobos v. Holguin, 146 Tex. 474, 208 S.W.2d 871 (1948)	10
West Texas Utilities Company v. Haskell County, 490 S.W. 2d 237 (Tex. Civ. App.—Eastland 1973, no writ hist.)	10

CASES	Page
White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980)	26
Zavala County v. E.D.K. Ranches, Inc., 544 S.W.2d 484 (Tex. Civ. App.—San Antonio 1976, no writ hist.)	10

UNITED STATES CONSTITUTION

Article I, Section 8, Clause 3	21
Article I, Section 10, Clause 2	13
Article VI, Clause 2	26

TEXAS CONSTITUTION

Article VIII, Section 1	9

UNITED STATES STATUTES AT LARGE

46 Stat. 690-691	30
48 Stat. 256	30

UNITED STATES CODE

19 U.S.C. § 1309	29
19 U.S.C. § 1312	32
19 U.S.C. §§ 1551-1565	27
19 U.S.C. § 1555	27
19 U.S.C. § 1556	28
19 U.S.C. § 1557	27, 28, 29, 33
19 U.S.C. § 1559	5

TEXAS REVISED CIVIL STATUTES

Title 122 V.A.C.S.	9
Art. 2524-1 V.A.C.S.	11

TEXAS RULES OF CIVIL PROCEDURES

Rule 683 T.R.C.P.	8, 9, 10

CODE OF FEDERAL REGULATIONS

19 C.F.R. § 19.1(a)(3)	27
19 C.F.R. § 19.1(a)(6)	4, 30
19 C.F.R. § 19.1(a)(7)	32
19 C.F.R. § 19.6(c)	28
19 C.F.R. § 113.55(a)	4

Page

CUSTOMS REGULATIONS

1915 Edition
Order of Publication
Art. 731 34
1923 Edition
Order of Publication
Art. 829 30
Art. 850 34
1931 Edition
Order of Publication
Art. 921 30
Art. 942 34
1937 Edition
Order of Publication
Art. 919 30
Art. 940 34

TREASURY DECISIONS

No. 21158 (1899) 35
No. 50200 (1940) 28, 29

CONGRESSIONAL HISTORY

Senate Report No. 58, 73rd Cong., 1st Sess. 30
77 Cong. Rec., Part III, 3212-3214 30
Senate Report No. 778, 95th Cong., 2d Sess. 16 (1978), U.S. Code Cong., Ad. News 2211, 2227, 2242, 2250, 2251 5

NO. 81-1489

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

XEROX CORPORATION,
Appellant,

v.

COUNTY OF HARRIS, TEXAS and
CITY OF HOUSTON, TEXAS,
Appellees.

On Appeal From The Texas Court of Civil Appeals

BRIEF FOR APPELLEE COUNTY OF HARRIS

STATEMENT

On September 30, 1977, Xerox Corporation, Appellant, instituted a declaratory judgment proceeding against Harris County, Texas to declare approximately 4000 copier machines exempt from state ad valorem taxation because the property was stored in federal bonded warehouses. The total number of machines varied from time to time as Xerox sold machines from the bonded warehouse.

The ruling below (Texas Court of Civil Appeals, 619 S.W.2d 402) was that state and local taxing authorities' imposition of nondiscriminatory ad valorem taxes on copier machines, assembled in Mexico, held as unsold inventory in a Houston customs bonded warehouse after assembly in Mexico and awaiting sale and shipment to Latin American countries, does not violate the Export-Import or Commerce Clauses.

THE CUSTOMS BOND

The customs bonded warehouse is a warehouse like any other public or private place where personal property is stored. Until payment of import customs duties to the United States or until export, personal property in a customs bonded warehouse is segregated from imported property on which customs duties have been paid. A bond in lieu of payment of customs duties is posted to insure payment of import duties. If the personal property were sold in this country, Xerox had merely to perform a one hundred dollar conversion to adapt the copiers which were not ready for domestic sale (some would not have required any conversion) to 60 cycle operation (Joint Appendix, pages 29a, 30a) and pay the import duties to have the customs bond remitted. Since the copiers were stored up to three years (Joint Appendix, page 31a) and then exported, no customs duties were paid, (Jurisdictional Statement Appendix, page 17a) and the bond was remitted. (Joint Appendix, pages 28a, 41a). There are eight classes of bonded warehouses categorized by the size and nature of the goods stored, the operator of the warehouse, and manufacturing or other operations performed while in storage. 19 C.F.R. § 19.1.

JURISDICTION

The Court lacks jurisdiction of this cause since there is an independent and adequate state ground of decision, the appellant Xerox Corporation having raised the federal issues in too abstract a fashion to finally resolve the controversy herein.

ARGUMENT

Xerox contends that its copiers are exempt from ad valorem taxation by Harris County, Texas because the copiers were stored in a United States Customs bonded warehouse. The fiction to which Xerox adheres is that the Customs bonded warehouse scheme is intended to create a constructive presence of the copiers in Mexico, Latin America, or anywhere else except Texas. Xerox relies on a footnote (19 C.F.R. § 19.6 n.11) to Treasury Regulations dealing with customs bonded warehouses. (Jurisdictional Statement, page 11). The footnote is not a *regulation* but a reference to *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414 (1940), which invalidated a New York sales tax on oil used for ship's stores which had been imported from Venezuela, stored in a customs bonded warehouse for refining, and exported in and as fuel for ships.

Xerox attributes the purported bonded warehouse exemption from state taxation to an 1846 congressional policy of: 1) allowing American importers to save payment of customs duties pending export; and 2) encouraging foreign commerce through American ports. (Appellant Xerox's Brief, pages 8, 9, 13 and 14). The legislative history cited, however, does not refer to state taxes but to "tax" as a synonym for federal customs duties.

Xerox, in the fact situation before the Court, manufactured its copier components in the United States, shipped these domestic goods across a common border with Mexico for additional fabrication and assembly, shipped the goods back to Houston, stored them in a Class 3 public storage bonded warehouse and eventually re-exported the copiers (Joint Appendix, pages 27a, 28a, 40a and 41a). Did Congress intend that domestic manufacturers could substantially manufacture goods in the United States, cross the Rio Grande for assembly of additional parts and thereby obtain state tax exemption for three years? See 19 C.F.R. § 113.55(a). The Congressional policy relative to Class 6 manufacturing bonded warehouses, 19 C.F.R. § 19.1(a)(6), set out in *McGoldrick,* supra, would apply to Xerox's situation were Mexican raw materials imported to the United States for manufacture here, thus providing domestic jobs, and then re-exported. In *McGoldrick,* Venezuelan crude oil was refined in New York. Had Gulf Oil shipped United States Crude to Venezuela for the addition of some Venezuelan oil, then returned to New York for refining free of local taxation for three years, the policy would have damaged Gulf's domestic competitors. The Tariff Act of 1842, as amended in 1846, was designed to protect domestic industry according to *Lawrence v. Allen,* 48 U.S. (7 Howard) 785, 12 L.Ed. 914 (1849) at page 792. Regulatory schemes for goods devoted to particular purposes, such as export liquor or ship's stores for exclusive use abroad are clearly set out by Congress. *Epstein v. Lordi,* 261 F.Supp. 921 (D.N.J. 1966).

On the other hand, cases such as *Fabri v. Murphy,* 95 U.S. 191 (1877), *United States v. Ehrgott,* 182 F. 267 (C.C.S.D.N.Y. 1910) and *Stone & Downer v. United*

States, 19 C.C.P.A. 259 (1931), concerning goods which are not the object of Federal regulatory schemes, such as sugar, beans and wool, merely stand for the policy of preventing *control* of imported goods by the importer until customs duties are paid. The place of storage is not the essential factor. *Hartranft v. Oliver,* 125 U.S. 525 (1888) at page 259.

The legislative history (Appellant Xerox's Brief, page 12, note 7) set out by Xerox from the Senate Report on the Customs Procedural Reform and Simplification Act of 1978, U.S. Code Cong. and Ad. News 2227, Pub. L. NO. 95-410, § 108, 92 Stat. 888, 892 (1978) is no more than a rationale for changing the time period (from three years to five years) that merchandise may remain in a customs bonded warehouse. The Senate Report gives a reason for *every* amendment to the law. "Serving a useful commercial purpose" found at page *2227,* is a general reason for amendment similar to the language found at page *2242* of the same report referring to "commercial practices". If the language was meant to have greater significance, then it is notably omitted from the House Conference Report Joint Explanatory Statement of the Committee of Conference concerning the same amendment at pages *2250* and *2251.* The five year period is not intended to be five years of tax exemption, but is the maximum period goods may remain in storage before being sold for the import duties. 19 U.S.C. § 1559 (1978) ("Warehouse goods deemed abandoned after 5 years").

The pre-1976 case authority (Appellant Xerox's Brief, Pages 22, 23) which Xerox offers to support its thesis comes down to this: It is congressional policy to nationally

regulate (exempt) imports by excluding goods stored in bonded warehouses (in transit) from the common mass of property in the state. Any state tax has a regulatory effect and prevents the Congress from speaking with one voice, i.e., exempting bonded imports. The analysis attempts to evade the Court's ruling in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976) by equating the "in transit" exemption set out at page 291 of *Michelin* with the pre-1976 case law based on original package/common mass doctrine of *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1872) which *Michelin* overruled at page 302. This Court rejected the same theory in *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978), saying the following at page 761:

> Second, respondents would distinguish *Michelin* on the grounds that Georgia levied a property tax on the mass of goods in the State, whereas Washington would tax the imports themselves while they remain a part of commerce. This distinction is supported only by citation to the *Licenses Cases*, 5 How., at 576, 12 L.Ed. 256 (opinion of Taney, C. J.). The argument must be rejected, however, because it resurrects the original-package analysis. See id., at 574-575. Rather than examining whether the taxes are "Imposts or Duties" that offend constitutional policies, the contention would have the Court explore when goods lose their status as imports and exports. This is precisely the inquiry the Court abandoned in *Michelin*, 423 U.S., at 279, 96 S.Ct., at 537. Nothing in the *License Cases*, in which a fractioned Court produced nine opinions, prompts a return to the exclusive consideration of what constitutes an import or export. [Emphasis Added].

Both the Treasury Regulations (Joint Appendix, page 93a, annotations) and case authorities cited by Xerox, with one exception, rely on some version of the original package/common mass theory. The exception, shipping containers in the *Japan Lines, Ltd.* case, were instrumentalities of foreign commerce, owned by foreign shippers, and the case was decided subsequent to the *Michelin* decision so that the doctrine did not become an issue. *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 1979, at pages 437 and 438.

The lower federal courts have not perceived the national policy that Xerox urges. In *Corex Corporation v. United States of America,* 454 F. Supp. 835 (C.D. Calif. 1978) it was held that imported goods in customs bonded warehouses were subject to California's ad valorem property tax. The Court at page 843 discussed the overruling of the original package/common mass doctrine.

Xerox has also cited a series of liquor *regulation* cases such as *Epstein v. Lordi,* 261 F. Supp. 921 (D.N.J. 1966); and *Hostetter v. Idlewild Bon-Voyage Liquor Corp.,* 377 U.S. 324 (1964) in support of the "in transit" exception to *Michelin.* These cases relate to state regulation of the liquor industry under the 21st amendment and not to bonded goods as such. *J. Henry Schroder Banking Corp. v. Schultz,* 373 F. Supp. 1283 (S.D. Tex. 1974), at page 1288.

The distinction between state prohibition of foreign commerce, which is not permitted by the Constitution, and a nonregulatory, nondiscriminatory ad valorem tax applied to all property regardless of foreign origin, upheld in *Michelin,* is the crux of the argument in this case and is more fully discussed infra, part III.

I.

THE UNITED STATES SUPREME COURT LACKS JURISDICTION OF THIS CAUSE BECAUSE OF AN INDEPENDENT STATE GROUND OF DECISION.

Harris County urges that the opinion of the Texas Court of Civil Appeals challenged herein specifically recites independent state grounds for reversal of the Trial Court's decision (Appendix to Jurisdictional Statement, pages 9a and 10a) as follows:

> Appellants by their third, fourth and fifth points of error complain that the injunctive relief granted by the trial court fails to comply with Rule 683, Tex. R. Civ. Proc., in that it (1) does not identify the parties enjoined (2) does not state the reason for the issuance of the injunction (3) does not identify the property involved, and (4) could be construed as operating for future taxes. Our disposition of previous points of error makes these objections irrelevant; but, *we agree with these contentions,* and, *in the event we are held on appeal to have erred in our holdings, we suggest that the Judgment be remanded* to the trial court to reform the injunctive portions of the judgment to comply with the requirements of Rule 683, T.R.C.P. [Emphasis Added].

The Appellate Court deliberately anchored its judgment on State law. *Orr v. Orr,* 440 U.S. 208 (1979). Rule 683, T.R.C.P. requires that equitable injunctive relief be specific. Even if the Texas Court of Civil Appeals had decided the federal question in Xerox's favor, the judgment of the Trial Court is too ambiguous to finally resolve the questions of what property, moving in and out of customs bond storage (Joint Appendix, page 17a) and being sold to government agencies for use abroad (Joint Appendix

page 33a); and which tax years and laws are said to be unconstitutional.

The Trial Court's judgment is vague because Xerox's pleadings below posed the federal issues in an abstract form and ignored the massive corpus of over 300 Texas Ad Valorem Tax Statutes found in volume 20 of the Texas Civil Statutes (Title 122, Articles 7041 to 7359a). Nor does the Trial Record indicate which Texas statutes are being applied to what property. See *Rescue Army v. Municipal Court,* 331 U.S. 549 (1947) at page 576. Xerox prefers to allude only to Texas constitutional and statutory provisions that provide for the taxation of all property. TEX. CONST. art. VIII, § 1.

The Trial Court's judgment also enjoins the assessment of taxes against Xerox ". . . for any of its personal property situated similarly to the photocopiers." However, it fails to identify the photocopiers to which it refers. In regard to the need for specificity in injunctions, Rule 683 T.R.C.P. provides:

> "*Every order granting an injunction* and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; *shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained;* and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." [Emphasis Added]

The portion italicized above has obviously been violated by the Trial Court in its revised judgment (Joint

Appendix, page 45a) which fails to describe the photocopiers to which it refers. The Trial Court's judgment is, therefore, erroneous on its face because it is not possible to determine, without reference to the Statement of Facts or Transcript, that the photocopiers to which the Trial Court refers are imports stored in the segregated area of the Houston Terminal Warehouse in Customs bond. The requirement of Rule 683 that the prohibited act be identified within the injunction is mandatory. See *Eastex Wildlife Conservation Association v. Jasper, et al, County Dog and Wildlife Protective Association,* 450 S.W.2d 904, 918 (Tex. Civ. App.—Beaumont 1970, writ ref'd n.r.e.); *West Texas Utilities Company v. Haskell County,* 490 S.W.2d 237, 239 (Tex. Civ. App.—Eastland 1973, no writ hist.); and *Hicks v. Young,* 553 S.W.2d 1, 2 (Tex. Civ. App.—Eastland 1977, aff'd in part 559 S.W.2d 343). The order also violates fundamental Texas law which requires that injunctions be "... definite, clear and precise ..." and ". . . not be so broad as to enjoin a defendant from activities which are lawful and a proper exercise of his rights." *Villalobos v. Holguin,* 146 Tex. 474, 208 S.W.2d 871, 875 (1948); See also *Grayson County Officials v. Dennard,* 574 S.W.2d 179, 185 (Tex. Civ. App.—Eastland 1978, writ ref'd. n.r.e.); and *Zavala County v. E.D.K. Ranches, Inc.,* 544 S.W.2d 484, 487 (Tex. Civ. App.—San Antonio 1976, no writ hist.).

The present suit relates only to the 1976 and 1977 tax years for reason that Xerox removed its warehouse operation to New York prior to the 1978 assessment date. However, it is possible that Xerox might relocate the operation back to Houston at some time in the future. Xerox sought declaratory relief as to the years of 1976 and 1977 and also sought that Harris County be enjoined from collecting those taxes. (Jurisdictional Statement

Appendix, page 33a; Joint Appendix, pages 8a, 9a). Xerox did not specifically ask for future relief. However, the Trial Court's judgment (Joint Appendix, page 45a) could be construed as speaking to the future as well as to the case before it. (". . . the defendants are permanently enjoined from assessing, collecting and enforcing the ad valorem taxes against Xerox Corporation for any of its personal property situated similarly to the photocopiers; . . .").

Under Texas tax law, each year's tax levy constitutes a separate debt. In exemption suits, the courts will consider each year on the basis of the law and facts applicable to that year. See *David Graham Hall Foundation v. Highland Park I.S.D.*, 371 S.W.2d 762, 766 (Tex. Civ. App. —Dallas 1963, writ ref'd n.r.e.); and *Osborne v. Boys Harbor, Inc.*, 462 S.W.2d 419, 422 (Tex. Civ. App.— Houston [1] 1970, no writ hist.). Texas courts do not look upon tax exemption with favor and always require the party seeking exemption to show that he is clearly entitled thereto under the law and the facts. See *River Oaks Garden Club v. City of Houston*, 370 S.W.2d 851, 854 (Tex. 1963); and *Davies v. Meyer*, 541 S.W.2d 827, 829 (Tex. 1976). Also fundamental to Texas law is the concept that "Assessing and equalizing taxes are not functions of the courts." *Republic Ins. Co. v. Highland Park I.S.D.*, 141 Tex. 224, 171 S.W.2d 342, 344 (1943); See also *Electra I.S.D. v. W. T. Waggoner Estate*, 140 Tex. 483, 168 S.W.2d 645 (1943). Both the facts and the law are subject to change with regard to future assessments.

The Trial Court's injunction violates not only tax law, but also the spirit of the Texas Declaratory Judgments Act. Art. 2524-1 V.A.C.S. In *Firemen's Insurance Com-*

pany of Newark, New Jersey v. Burch, 442 S.W.2d 331, 333 (Tex. 1968), the Court said:

> "This court has repeatedly held that under our Constitution, the judicial power does not embrace the giving of advisory opinions. *Morrow v. Corbin,* 122 Tex. 553, 62 S.W.2d 641 (1933); *California Products, Inc. v. Puretex Lemon Juice, Inc.,* 160 Tex. 586, 334 S.W.2d 780 (1960); *United Services Life Insurance Co. v. Delaney,* 396 S.W.2d 855 (Tex. Sup. 1965), and authorities therein cited. Article 5, § 8 of the Texas Constitution, Vernon's Ann. St. does not empower the district courts to render such opinions and as jurisdiction is a matter of constitutional delineation, the Legislature could not and has not by the passage of the Uniform Declaratory Judgments Act, empowered the district courts to render advisory opinions. In 1960, this court again reiterated the principle that the giving of such opinions is not a judicial function, but that in governmental affairs, the duty to render advisory opinions is vested in the executive branch of government and that in private business, the giving of legal advice is the function of the legal profession. *California Products, Inc. v. Puretex Lemon Juice, Inc.,* 160 Tex. 586, 334 S.W.2d 780 (1960). Also in the *Puretex* case, this court cited and quoted from *Ladner v. Siegel,* 294 Pa. 368, 144A. 274 (1928), as correctly laying down the proposition that the Declaratory Judgments Act gives the court no power to pass upon hypothetical or contingent situations, *or determine questions not then essential to the decision of an actual controversy, although such questions may in the future require adjudication.* [Emphasis Added]

See also *Roberts v. Southwestern Life Ins. Co.,* 244 S.W. 2d 302, 308 (Tex. Civ. App.—Dallas 1951, writ ref'd

n.r.e.); and *Orange I.S.D. v. West Orange I.S.D.*, 390 S.W.2d 81, 89 (Tex. Civ. App.—Beaumont 1965, writ ref'd n.r.e.). The exemption status of the photocopiers, if returned to Houston in the future, should be subject to determination on the basis of then applicable law and facts upon each assessment date for taxes. Notwithstanding the eventual outcome of this case, the Trial Court should not have invaded the province of the office of the County's Tax Assessor-Collector. Instead the Tax Assessor-Collector should be left free to perform his future assessment functions pursuant to law.

II.

IMPORTED GOODS STORED IN A UNITED STATES CUSTOMS BONDED WAREHOUSE ARE NOT EXEMPT FROM STATE AND LOCAL TAXATION UNDER THE IMPORT/EXPORT CLAUSE.

Article I, § 10, clause 2 of the United States Constitution provides in pertinent part that:

1) No state shall lay any imposts or duties
2) on imports
3) or exports
4) without the consent of Congress

A. The Original Package Doctrine has been overruled.

In *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, (1827), the U.S. Supreme Court considered the question of whether the State of Maryland could impose a business license fee upon retailers, including those who engaged

in the import business. In addition to holding that the license fee itself was prohibited under the Import-Export Clause, the Court sought to establish a dividing line between the tax authority of the several states and that of the Federal government by saying the following at pages 441 and 442:

> "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution."

Xerox relies on the "original package" doctrine of *Brown v. State of Maryland,* claiming that its copiers never entered domestic commerce or became part of the common mass of property in Texas. Xerox insists that three years in Houston is merely a transitory period of time for property stored in a customs bonded warehouse.

The policy of *Brown* was to prevent importing states from laying a tax on non-importing states to which the goods were destined. Since the goods in question here were said to be eventually intended for export to Latin America, there is no burden on non-importing states. There is further no indication that the Court in *Brown* intended to grant immunity from state taxation when goods are brought into the United States for the importer's own purpose. 25 U.S. at page 443.

About fifty years after *Brown*, in *Low v. Austin*, 80 U.S. (13 Wall) 29 (1872), the U. S. Supreme Court came to consider the question of a nondiscriminatory ad valorem tax levied upon all goods, whether imports or not, by California authorities. In extending the *Brown* case, the Court said the following at 20 L.Ed. page 519:

> "The Supreme Court of California appears, from its opinion, to have considered the present case as excepted from the rule laid down in *Brown v. The State of Maryland*, because the tax levied is not directly upon imports as such and, consequently, the goods imported are not subjected to any burden as a class, but only are included as part of the whole property of its citizens which is subjected equally to an ad valorem tax. But the obvious answer to this position is found in the fact, which is, in substance, expressed in the citations made from the opinions of Marshall and Taney, that the goods imported do not lose their character as imports, and become incorporated into the mass of property of the State, until they have passed from the control of the importer or been broken up by him from their original cases. Whilst retaining their character as imports, a tax upon them in any shape, is within the constitutional prohibition. The question is not as to the extent of the tax, or its equality with respect to taxes on other property, but as to the power of the State to levy any tax. If, at any point of time between the arrival of the goods in port and their breakage from the original cases, or sale by the importer, they become subject to state taxation, the extent and the character of the tax are mere matters of legislative discretion."

For the next hundred years or so, the law with respect to ad valorem taxes on import and export goods, remained

static with import cases generally inquiring as to whether the goods had "lost their status as imports" and export cases inquiring as to whether the goods had embarked upon their "final journey." The various "hair splitting" factual scenarios presented are of no importance here as Xerox's goods would clearly have been exempt under *Low,* because they were segregated from the mass of property within Harris County at the warehouse where Xerox had placed them upon import.

In the mid-1970's a typical import original package doctrine ad valorem tax case came up through the Courts of Georgia. *Michelin Tire Corp. v. Wages,* 423 U.S. 276 (1976) involved the usual issue of whether Michelin's tires as stored at a regional distribution center had lost their status as imports. Certiorari was granted by the U. S. Supreme Court. In lieu of considering the narrow original package doctrine questions as to whether the tires had lost their status as imports, the U. S. Supreme Court chose in Michelin to reverse *Low* and rewrite the law on the Import-Export Clause vis-a-vis the state's rights to levy nondiscriminatory ad valorem taxes on imports. Based upon a lengthy examination of the constitutional meaning of the words "impost" and "duty" and the nature of nondiscriminatory ad valorem taxes, the Court said in *Michelin,* supra, at 423 U.S. 284:

> "Our independent study persuades us that a nondiscriminatory ad valorem property tax is not the type of state exaction which the Framers of the Constitution or the Court in *Brown* had in mind as being an 'impost' or 'duty' and that *Low v. Austin's* reliance upon the *Brown* dictum to reach the contrary conclusion was misplaced."

The Court concluded that the nondiscriminatory Georgia ad valorem tax levied upon Michelin's distribution warehouse stock was not an impost or duty because (1) it had no impact whatever upon the Federal regulation of foreign commerce as it was levied upon property in general rather than upon imports alone, (2) it did not deprive the Federal Government of its right to lay duties and instead provided compensation to Georgia for the basic public services afforded to persons and property within its jurisdiction and (3) it did not interfere with commerce, and only exacted a *quid pro quo* for benefits provided (in lieu of the subsidy on imports which would exist if taxation were not permitted). The tax issue here (like the Georgia tax) is a uniform ad valorem tax which does not discriminate on the basis of the origin or destination of goods. The Trial Court so found at Jurisdictional Statement Appendix at pages 18a, 19a. The Court has recently affirmed that the *Michelin* test applies to exports as well as to imports. *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies,* 435 U.S. 734, (1978). Accordingly, it is now clear that nondiscriminatory ad valorem taxes may be applied to goods stored for export distribution just as to goods stored for import distribution. The tax is not an impost or duty. Therefore, the import or export status of the goods is immaterial so long as the tax is nondiscriminatory.

B. Goods which have not physically entered the export stream are not "in transit" though stored in a customs bonded warehouse.

The only instance in which the *Michelin* opinion suggests that a nondiscriminatory ad valorem tax might be

invalid is that in which it was levied upon ". . . goods which are merely in transit through the State when the tax is assessed." *Michelin,* 423 U.S. at page 291. The Framers' intent of putting an end to public piracy by coastal states which had existed during the Articles of Confederation period would thereby be served.

The goods in Xerox's local warehouse had come to rest. The machines taxed by the County were in crate, unsold and uncommitted as a matter of law for foreign sale on the tax assessment date. The Trial Court so concluded as to most copiers (Jurisdictional Statement Appendix, page 19a). Subsequent to 1974 they remained in the warehouse for periods up to three years (Joint Appendix, 31a) until such time as they were sold to one of Xerox's various marketing arms in Latin America.

The Supreme Court disposed of this issue in *Michelin,* supra, at 423 U.S. page 302:

> "Petitioner's tires in this case were no longer in transit. They were stored in a distribution warehouse from which petitioner conducted a wholesale operation, taking orders from franchised dealers and filling them from a constantly replenished inventory. The warehouse was operated no differently than would be a distribution warehouse utilized by a wholesaler dealing solely in domestic goods, and we therefore hold that the nondiscriminatory property tax levied on petitioner's inventory of imported tires was not interdicted by the Import-Export Clause of the Constitution."

Obviously, this is the same mode of operation adopted by Xerox with respect to the warehousing of its copiers. As the Court points out in footnote 11 at 423 U.S., page

291 of *Michelin*, the transit issue amounts to little more than a restatement of the traditional Commerce Clause doctrine. Goods lose "in transit" immunity from a non-discriminatory tax when their owners bring them to rest indefinitely for the owner's business convenience pending further shipment—even though such further shipment may be fully intended. See *Bacon v. Illinois*, 227 U.S. 504 (1913); *Susquehanna Coal Co. v. City of South Amboy*, 228 U.S. 665 (1913); and *Independent Warehouses v. Scheele*, 331 U.S. 70 (1947).

A related issue was discussed in *Kosydar v. National Cash Register Co.*, 417 U.S. 62 (1974). Although it arose prior to the reversal of the old "import status" test in *Michelin*, the case is significant because it involved facts virtually identical to those in this suit. Like Xerox, National Cash Register had manufactured machines intended only for foreign use and had moved them from its factory to a United States warehouse which served as its foreign distribution point. The only factual difference is that the goods were assembled in the United States rather than being exported for assembly by foreign labor and re-imported under Customs bond for storage pending export. The Court held at 417 U.S., page 72 that the mere certainty of export and absence of possibility that the goods would be diverted to use in the United States did not place them in import-export commerce because they had not commenced the process of exportation by ". . . physical entry into the stream of exportation . . ." such as by being turned over to a truckline or steamship company for transportation to a designated buyer at a foreign port. Even if the U. S. Supreme Court had not made the obvious extension of the *Michelin* test to exports in *Department of Revenue of the State of Washington*,

Xerox's goods could still not escape taxation on an export stream basis.

The application of the *Michelin* case is not new in Texas. In *City of Farmers Branch v. Matsushita Electric Corporation of America,* 537 S.W.2d 452, 453 (Tex. 1976), the Court said:

> "We understand the holding of *Michelin* to be that where the tax is not upon the importation or movement of imported goods, and where the goods are no longer in transit, the goods are subject to the imposition of nondiscriminatory ad valorem property taxation by the states and their subdivisions.
>
> "We agree with the Supreme Court that there is no reason why an importer should not bear his share of the cost of services such as police and fire protection along with his competitors who handle only domestic goods. As the Supreme Court said in *Michelin,* the Import-Export clause '. . . cannot be read to accord imported goods preferential treatment that permits escape from uniform taxes imposed without regard to foreign origin for services which the State supplies.
>
> "The ad valorem tax imposed by Farmers Branch is clearly nondiscriminatory and applicable to all such stored goods whether imported or not. The property of Matsushita is therefore subject to the tax."

The case before this Court involves in excess of 4,000 machines, valued at about $9,000,000 (Joint Appendix, pages 17a, 24a) which were stored in Harris County at the convenience of Xerox. The goods received the protection of public services pending their eventual sale. The Court found that the tax was uniform and nondis-

criminatory as a matter of fact and that the goods were stored and were not committed to foreign sale on the assessment dates. (Jurisdictional Statement Appendix, page 19a). Based on Xerox's own testimony, the goods remained for seven and one-half to twenty-five months on average. As such, the residents of the County are clearly entitled to *quid pro quo* taxation for services rendered under *Michelin*. The undisputed facts as found by the Trial Court provide every element needed for a holding that the tax in question is not an impost or duty. Therefore, it does not offend the Import-Export Clause of the U. S. Constitution.

III.

THE COMMERCE CLAUSE DOES NOT EXEMPT GOODS STORED IN A CUSTOMS BONDED WAREHOUSE FROM STATE AND LOCAL TAXATION.

Article I, Section 8, Clause 3 of the U.S. Constitution provides in part that "Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

There has been little direct consideration of the Commerce Clause as related to nondiscriminatory ad valorem taxes on imported goods for the obvious reason that such a tax was usually considered, until *Michelin*, to be prohibited as an impost or duty under the Import-Export Clause as interpreted by the *Low* case, supra. The Import-Export Clause is self operative in that it sets forth a prohibition on the tax authority of the states, but the Commerce Clause contains no such prohibition. In *Department of Revenue of the State of Washington*, supra,

the Court said the following in 435 U.S. at page 750: "The Commerce Clause does not state a prohibition; it merely grants specific power to Congress." The Trial Court's holding with respect to the Commerce Clause presents two separate questions as to (1) whether the nondiscriminatory ad valorem tax on Xerox's copiers offends the regulatory powers reserved to Congress per se and (2) whether the Congress has acted (or could act) to prohibit the nondiscriminatory ad valorem tax on Xerox's copiers.

A. The tax at issue herein does not impose an undue burden on interstate commerce.

The power of Congress to regulate both interstate and foreign commerce derives from the Commerce Clause. The courts have long recognized that the power of Congress in both areas operates in substantially the same manner, and that the Clause does not prohibit legitimate non-regulatory taxation of goods in commerce. See *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, (1824); *Brown v. Maryland,* supra; and *M'Culloch v. Maryland,* 17 U.S. (4 Wheat.) 316, (1819). The mere fact that a tax adds to the cost of doing business does not offend the Commerce Clause. "The Commerce Clause balance tips against the tax only when it unfairly burdens commerce by exacting more than a just share from the interstate activity." *Department of Revenue of the State of Washington,* supra, 435 U.S. at page 748.

In *Brown v. Houston,* 114 U.S. 622 (1885), the U.S. Supreme Court considered the question of whether coal in storage at the Port of New Orleans for domestic and international sale could be subjected to the local nondis-

criminatory ad valorem tax. Although the case is burdened to some degree by the now defunct original package doctrine concept of *Low* and *Brown v. Maryland,* supra, the Court clearly set forth the right of the states to assess a nondiscriminatory ad valorem tax on goods in commerce at page 634:

> "It cannot be seriously contended, at least in the absence of any congressional legislation to the contrary, that all goods which are the product of other states are to be free from taxation in the state to which they may be carried for use or sale. Take the city of New York, for example. When the assessor of taxes goes his round, must he omit from his list of taxables goods which have come into the city from the factories of New England and New Jersey, or from the pastures and grain-fields of the West? If he must, what will be left for taxation? And how is he to distinguish between those goods which are taxable and those which are not? With the exception of goods imported from foreign countries, still in the original packages, and goods in transit to some other place, why may he not assess all property alike that may be found in the city, being there for the purpose of remaining there till used or sold, and constituting part of the great mass of its commercial capital: provided always that the assessment will be a general one, and made without discrimination between goods the product of New York, and goods the product of other states? Of course, the assessment would be a general one, and not discriminative between goods of different states. The taxing of goods coming from other states, as such, or by reason of their so coming, would be a discriminating tax against them as imports, and would be a regulation of interstate commerce, inconsistent with that perfect freedom of trade which congress has seen fit should remain undisturbed. But if, after their arrival in the state,—that being their place of destination for use or trade,—if,

> after this, they are subjected to a general tax laid alike on all property within the city, we fail to see how such taxing can be deemed a regulation of commerce which would have the objectionable effect referred to."

See also, *Bacon; Susquehanna Coal Co.;* and *Independent Warehouses,* supra.

B. The tax at issue herein does not interfere with foreign commerce.

While this Court in *Michelin* did not directly mention the Commerce Clause in the body of its opinion, it is clear that it considered the impact of ad valorem taxation on the power of the Congress to regulate foreign commerce. *Michelin,* supra, 423 U.S. at page 287:

> "It is obvious that such nondiscriminatory property taxation can have no impact whatsoever on the Federal Government's exclusive regulation of foreign commerce, probably the most important purpose of the Clause's prohibition. By definition, such a tax does not fall on imports as such because of their place of origin. It cannot be used to create special protective tariffs or particular preferences for certain domestic goods, and it cannot be applied selectively to encourage or discourage any importation in a manner inconsistent with federal regulation."

The Supreme Court has, from time to time, addressed itself to concerns for the need of the Federal Government to "speak with one voice," and suggested that Congress should have more authority in the regulation of some aspects of foreign commerce than domestic commerce. Such concern has been addressed to the end that "No

foreign business or vessel is taxed." *Department of Revenue of the State of Washington,* supra, 435 U.S. at page 754; and footnote 14 to *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, (1979). No similar issues are involved here because the goods are not instrumentalities of commerce (e.g. vessels or shipping containers), and they belong to a domestic corporation. Furthermore, there is no treaty, home port, nexus or fair apportionment question as presented in *Japan Line, Ltd.* which considered shipping containers constantly moving from place to place in foreign commerce rather than goods at rest. *Japan Line, Ltd.* faced a genuine danger of multiple taxation. Shipping containers taxed in California could also be taxed by foreign governments which are beyond the jurisdiction of domestic courts to fairly apportion the tax. That danger could only be effectively addressed by Federal law and international treaties. The Supreme Court has again stated that the object of its concern in *Japan Line, Ltd.* was ". . . duplicative taxation at the international level . . ." in *Mobil Oil Corporation v. Commissioner of Taxes of Vermont,* 445 U.S. 425, (1980). At pages 448 and 449 of *Mobil,* the Court makes it clear that absent such an international treaty-related problem which can only be cured by Congress, the law need not differ with respect to taxation of interstate as opposed to foreign commerce.

On the other hand, Xerox faced no danger of double taxation and could have reduced or avoided the County's tax at its own initiative by limiting its inventory to its reasonable needs. Harris County submits that its tax does not intrude upon the rights of Congress under the Commerce Clause because it is a domestic tax of nondiscrimin-

atory character levied upon a domestic corporation which had brought unsold goods to rest in Harris County for its own convenience pending sale. The fact that the tax adds to Xerox's cost of doing business does not per se violate the Commerce Clause, because the tax only exacts a reasonable fee for services rendered. Such a tax does not offend the right of the Congress to regulate commerce as discussed in *Michelin* and *Department of Revenue of the State of Washington,* supra. The international issues of double taxation discussed in *Japan Line, Ltd.* are not present in this case.

C. The Congress has not exempted Xerox's copiers from state and local taxation.

Xerox has maintained that its goods are exempt as a matter of Federal regulation through the Commerce Clause as coupled with the Supremacy Clause—Article VI, Cl. 2 of the U.S. Constitution which provides in part that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land. . . ."

The Federal regulatory scheme authorizing eight classes of bonded warehouses and controlling the segregation of bonded goods is not affected by the Texas ad valorem tax. The record shows no regulatory function of the Secretary of the Treasury that would be obstructed by the tax, no Federal revenue lost, and no additional factors to be taken into account by Federal agents as a consequence of the tax. See *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980). On the other hand, the taxing authorities provided port facilities for distribution of Xerox copiers. (Joint Appendix page 42A).

Based upon the foregoing authorities and the fact that the tax was levied upon a domestic corporation's goods (not vessels), there is serious doubt as to whether Congress would have any legitimate regulatory purpose in prohibiting the tax imposed here. Regardless, Harris County submits that the only regulatory schemes currently mentioned in the Code of Federal Regulations could not be applicable to Xerox's copiers because they are not liquor or ships' stores irrevocably committed to foreign commerce.

1. The *McGoldrick* case is distinguishable.

Pursuant to 19 U.S.C. §§ 1551-1565, and related provisions, the Secretary of the Treasury is permitted to allow the transport of imported merchandise and/or the storage of such merchandise in bonded warehouses in the United States without the payment of customs duties thereon. The obvious purposes of the system are (1) to permit the through transport of foreign origin goods having a foreign destination such as grain moving from Canada to Mexico, (2) to allow storage of imported goods which have a final foreign destination pending transportation connections, (3) to allow storage of imported goods which do not have a foreign or domestic destination at the owner's pleasure pending his decision whether to sell them inside or outside of the United States and (4) to allow certain manufacturing and processing of foreign materials in domestic facilities. Xerox's copiers were entered in a storage warehouse (class 3) established pursuant to 19 U.S.C. § 1555 and 19 C.F.R. § 19.1(a)(3). Pursuant to 19 U.S.C. § 1557, Xerox had three years (now five) in which it could store the copiers without

paying the duty. Under 19 U.S.C. § 1557, Xerox had the option of (1) withdrawing the copiers for domestic consumption upon paying the duty of about five percent or (2) withdrawing them duty free for foreign export. 19 U.S.C. § 1556 authorizes the Secretary of the Treasury to adopt *necessary* regulations by providing as follows:

> "The Secretary of the Treasury shall from time to time establish such rules and regulations as may be necessary for the establishment of bonded warehouses and to protect the interests of the Government in the conduct, management, and operation of such warehouses and in the withdrawal of and accounting for merchandise deposited therein."

No regulation prohibiting state and local taxation of goods in bonded warehouses currently exists in the body of the Code of Federal Regulations. There is however a footnote (no. 11) below (but not directly related to the subject of) 19 C.F.R. § 19.6(c) which provides that "Imported goods in bonded warehouses are exempt from taxation or judicial process of any State or subdivision thereof. (See T. D. 50200.)." T. D. 50200 (1940) merely consists of the following:

> "(T. D. 50200)
>
> Decision of the Supreme Court of the United States
>
> Affirming judgment of the New York Court of Appeals that *fuel oil manufactured in bonded warehouse* and free of duty upon *withdrawal for use as vessels' supplies* is not subject to *sales tax* under state law in view of congressional policy.

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D. C., July 25, 1940.

To Collectors of Customs and Others Concerned:

The appended opinion of the United States Supreme Court in the case of *McGoldrick v. Gulf Oil Corp.*, (March 25, 1940), 309 U.S. 414, *is published for the information of customs officers and others concerned.* (552.3)

W. R. JOHNSON,
Commissioner of Customs."

[Emphasis added]

McGoldrick v. Gulf Oil Corporation, 309 U.S. 414 (1940) as appended to the Treasury Decision is inapplicable in fact and law to the case before this Court:

1) *McGoldrick* involved a sales tax rather than a nondiscriminatory ad valorem tax. Gulf Oil Corp. could not limit or avoid the tax by controlling its inventory on the assessment date. The tax had an unavoidable impact upon foreign commerce because it applied to all sales on every day of the year. The taxable event of sale in foreign commerce created no burden on the State of New York by virtue of the use of the oil on the high seas.

2) *McGoldrick* involved fuel oil sold to proper vessels of war belonging to friendly reciprocating nations and foreign bound fishing and trade vessels rather than ordinary trade merchandise. It was withdrawn as ships' stores pursuant to 19 U.S.C. § 1309, rather than 19 U.S.C. § 1557, as here. Congress had expressed a direct and special interest in protecting petroleum refiners from

loss of fuel oil business to international vessels in the passage of § 630 of the Revenue Act of 1932. (48 Stat. 256) See *McGoldrick*, supra, 309 U.S. at pages 428, 429 citing Senate Report No. 58, 73d Cong., 1st Sess. and 77 Cong. Rec., Part III, 3212-3214. (See Joint Appendix, pages 94a to 107a). Both the House and Senate records make direct reference to fuel oil and ships' stores. Through the reciprocal withdrawal privileges operation of § 309 of the Tariff Act of 1930 (46 Stat. 690-691) such action no doubt directly benefitted the United States Government's foreign war vessel supply purchases. The system also restored domestic refinery jobs which were being lost to foreign labor. Xerox has cited no similar direct Federal interest in protecting the imported copier business, and Harris County is not aware of any. Only recently, the U. S. Supreme Court said that ". . . some explicit directive from Congress . . ." would be required in order for it to find Federal preemption of state tax authority. *Mobil Oil Corporation*, supra, 445 U.S. at page 449.

3) The oil in *McGoldrick* was refined by Gulf in the United States in a Class 6 warehouse rather than being foreign made goods stored in a Class 3 warehouse. Class 6 warehouses, as then and now defined are "Warehouses for the manufacture in bond, *solely for exportation*, of articles made in whole or in part of imported materials or of materials subject to internal revenue tax; and for the manufacture for home consumption or exportation of cigars in whole of tobacco imported from one country." [Emphasis Added] 19 C.F.R. § 19.1(a)(6); Art. 829, Customs Regulations of 1923; Art. 921, Customs Regulations of 1931; and Art. 919, Customs Regulations of

1937. (See Joint Appendix pages 49a to 93a). Accordingly, the Court found in *McGoldrick*, supra, 60 S.Ct. at page 668 that the oil ". . . cannot lawfully be removed from the manufacturing warehouse except for delivery for use as fuel to a vessel engaged in foreign commerce . . .", and that pursuant to Gulf's bonds, the oil ". . . shall not be diverted from its ultimate destination as ships' stores." No similar "foreign sale only" regulations or bonds exist with respect to goods such as Xerox's copiers in a Class 3 (storage) warehouse. Xerox was not obligated to sell its copiers internationally. (Jurisdictional Statement Appendix, page 19a).

Prior to *Michelin*, the bulk of import goods in storage, including Xerox's copiers, were exempt by virtue of import status alone. The Customs bond, if any, was of no importance to their ad varolem tax exempt status. The only case which has recently examined *McGoldrick* on its merits as applied to an ad valorem tax is *American Smelting and Refining Company v. County of Contra Costa*, 77 Cal. Rptr. 570 (Ct. App. 1969) appeal dism. 396 U.S. 273 (1970). After lengthy analysis of *McGoldrick*, the Court said at page 597:

> "The paragraphs in *Gulf Oil* referring to the Customs Regulations are said to establish as a matter of law that Congress has provided, 'imported goods in bonded warehouse are exempt from taxation under the general laws of the several States.' (See 309 U.S. at p. 426, 60 S.Ct. at p. 668; fn. 26, supra, and accompanying text.) The court did state, 'These regulations * * * were thus in force when the Tariff Act of 1930 was adopted and were incorporated by reference [citation] by the provisions of §§ 309, 311 already noted * * *.' (Id.) In concluding, how-

> ever, the following observation was made: 'The customs regulation prescribing the exemption from state taxation, *when applied to the facts of the present case,* states only what is implicit in the Congressional regulation of commerce *presently involved.*' (Id. at p. 429, 60 S.Ct. at p. 669; emphasis added.) The court thereby left open the question whether the regulation in question applies to the facts of this case and the regulation of commerce of the type here involved. The warrant to examine the extent of the *Gulf Oil* ruling as to the weight to be accorded to, and the scope of the regulation, is further supported by the fact that the precedents upon which the regulation was based were of limited application, [28] and by the additional fact that there was no such regulation, but merely a footnote (see fn. 26, supra) in existence during the years of the proposed assessments in question in this case. *It is concluded that the footnote has no more weight than the precedent upon which it rests;* and that to paraphrase the Treasury decision (see fn. 26, supra): Imported goods in bonded warehouse *which are subject to withdrawal only for export or for use as ships' stores* are exempt from taxation of any state or subdivision thereof. The law has gone no further." [Emphasis Added]

See also footnote 28 at pages 597 and 598 of *American Smelting and Refining Co.* for the Court's excellent analysis of the regulations and authorities upon which *McGoldrick* is based.

The Court concluded that *McGoldrick* did not extend unconditionally to a Class 7 bonded smelting warehouse conducted under 19 U.S.C. § 1312 and 19 C.F.R. § 19.1 (a)(7). Like the Xerox goods stored in a Class 3 warehouse, the metals refined from the ore in a Class 7 warehouse are not irrevocably committed to foreign sale.

The Court allowed exemption only on that portion of the smelter's metals which were ". . . unconditionally appropriated for re-export . . ." by virtue of existing contracts on the tax lien date. *American Smelting* at page 605. Of American Smelting & Refining Company's total inventory of about $12,353,000 in foreign ores, a portion representing about $8,970,000 was in bond. The materials allowed tax exemption as unconditionally appropriated by contract for re-export on the tax lien date amounted to only $132,000 or about one percent. (Footnote 6 at page 577)

Xerox was not contractually or legally obligated to export the copiers. They were under customs bond for protection from U.S. import duties while warehoused pending disposition under 19 U.S.C. § 1557. Although some additional Underwriters Laboratories' certifications and/or minor component modifications costing $100 on the average would have been required on a portion of the copiers before domestic use, Xerox at its sole business discretion could either withdraw the machines for domestic use by paying the duty or avoid the duty entirely by exporting them. The machines on which the tax is based were certified by Xerox as being unsold on the assessment date, and the Court found that they were not committed as a matter of law to foreign commerce. (Jurisdictional Statement Appendix, page 19a). Xerox's business practice of exporting all Mexican copiers is neither a substitute for the legal and contractual obligations which bound Gulf Oil not to sell its oil for domestic use nor a substitute for the toll contracts which American Smelting had in existence on the tax lien date for export of that portion of its metals on which tax exemption was granted.

2. A Treasury Regulation footnote citing *McGoldrick* is based on the overruled Original Package Doctrine.

Harris County also submits that the circa 1915 to 1937, regulations cited by the U.S. Supreme Court in *McGoldrick* as authority for the proposition that goods in bond are exempt from local taxation and the cases based on the "common mass of goods" doctrine (see Appellant Xerox's Brief at pages 14 and 15) are no longer valid law after *Michelin*. The Treasury Department issued regulations, from time to time, in book form. These regulations are not solely administrative regulations in the sense of the current Code of Federal Regulations. Instead, they were compilations of statute law, Treasury Decisions, and case law which were intended to serve as field guides for Customs agents. The Orders of Publication for the 1915, 1923, 1931 and 1937 editions as contained therein so reflect. (See Joint Appendix pages 51a, 60a, 68a and 83a). The books are annotated with source references to the statute law, case law and Treasury Decisions from which their contents are derived.

The regulation which appeared in Art. 731 of the 1915 Customs Regulations, Art. 850 of the 1923 Customs Regulations, Art. 942 of the 1931 Customs Regulations and Art. 940 of the 1937 Customs Regulations as cited by the U.S. Supreme Court at 60 S.Ct. page 668 in *McGoldrick* was obviously intended to protect the Treasury's field agents rather than to promote foreign commerce. Said Articles provided in part that: "Imported goods in bonded warehouse are exempt from taxation under the general laws of several states." (See Joint Appendix, pages 58a, 66a, 77a, and 93a). That provision of the

various regulations has five (5) annotations. First, it cites the *Low* case, supra, which applied the import status test to nondiscriminatory ad valorem taxes as reversed in *Michelin.* The second and third citations are *Blount v. Munroe,* 60 Ga. 61 (Ga. 1878) and *Clarke v. Clarke,* 3 Woods 408, 5 Fed. Cas. 943 (S.D. Georgia 1877), both of which hold that goods in the export stream of actual process of export on the assessment date are exempt from state ad valorem tax under the Import-Export clause. Fourthly, it cites *State ex rel. Rhett v. Pinckney,* (1857) 10. Rich L. 474. *Rhett* is cited in footnote 28 to *American Smelting and Refining Co.,* supra, as a South Carolina case on interstate rather than foreign commerce. Finally, it cites the two sentence long T.D. 21158 (1899) which merely affirms a field agent's refusal to render warehoused property under the then correct law of *Low* that segregated and stored goods from abroad had no status for taxation. As such, the regulations merely reflected the correct law of the time as now substantially rewritten in *Michelin,* supra, namely that the ad valorem tax was prohibited as an impost or expost when applied to goods having import or export status.

The fact that the goods were in a bonded warehouse was not an operative fact for the exemption as it then existed by operation of law under the Import-Export clause as interpreted by the U.S. Supreme Court in *Low* and by the Treasury Department in its regulations. The doctrine that imports have no status for ad valorem taxes until they "lose their import character" no longer exists as it did with *Low.* The footnote in the current regulations rests upon *McGoldrick* which in turn rests upon Import-Export Clause law that was reversed in *Michelin.* The

application of the *McGoldrick*-based footnote here to a case which is distinguishable in fact and law from *McGoldrick* can only serve to perpetuate a myth which expired in *Michelin* by denying Harris County *quid pro quo* compensation for public services rendered. In *McGoldrick*, the Supreme Court clearly limited its decision to the facts before it at 309 U.S. 430. Accordingly, the County submits that its nondiscriminatory ad valorem tax is neither precluded by the Commerce Clause nor precluded by valid regulations promulgated thereunder, but is payment for public services rendered to Xerox.

CONCLUSION AND PRAYER

Harris County prays that the judgment of the Texas Court of Civil Appeals be affirmed.

Respectfully submitted,

MICHAEL H. DRISCOLL
County Attorney

JOHN J. GREENE
Assistant County Attorney
1001 Preston, Suite 634
Houston, Texas 77002
(713) 221-5101

Counsel for Appellee
County of Harris, Texas

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing Brief in the Supreme Court of the United States was served on the counsel listed below by mail on this _____ day of July, 1982 by depositing it in a United States post office with first class postage prepaid to each of those counsel at his/her post office address.

JOHN J. GREENE
Assistant County Attorney

Copies to:

Mr. Alfred H. Hoddinott, Jr.
800 Long Ridge Road
Stamford, Connecticut 06904

Ms. Cheryl Helena Chapman
Assistant City Attorney
P. O. Box 1562
Houston, Texas 77001

Mr. Mark W. White
Attorney General, State of Texas
P. O. Box 12548
Austin, Texas 78711

Appellee's Brief

2

Office - Supreme Court, U.S.
FILED
JUL 22 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-1489

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

XEROX CORPORATION,
Appellant,

v.

COUNTY OF HARRIS, TEXAS, and
CITY OF HOUSTON, TEXAS,
Appellees.

On Appeal From The Texas Court of Civil Appeals

BRIEF FOR APPELLEE CITY OF HOUSTON

F. J. COLEMAN, JR.
City Attorney

JAY D. HOWELL, JR.
Senior Assistant City Attorney

CHERYL HELENA CHAPMAN
Senior Assistant City Attorney
Counsel of Record

BELINDA TURNER SAULSBERRY
Assistant City Attorney

P. O. Box 1562
Houston, Texas 77251
(713) 222-5151

Counsel for Appellee,
City of Houston

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
INDEX OF AUTHORITIES	III
STATEMENT	1
SUMMARY OF ARGUMENT	2
ARGUMENT	7
I. A Nondiscriminatory Ad Valorem Tax is Authorized By The United States Constitution	7
A. A Nondiscriminatory Tax is Authorized by the Commerce Clause	7
B. A Nondiscriminatory Tax is Authorized by the Import-Export Clause	10
II. The Customs Bonded Inventory Was Not "In-Transit"	13
A. The Bonded Copiers Were Not Moving In Transit	14
B. Customs Bonded Storage Does Not Create "In Transit" Status	15
III. Inventory Stored In A Customs Bonded Warehouse Is Not Immune From Local Taxation	17
A. Custom Bonded Warehouses	18
B. The Customs Laws Do Not Immunize Bonded Goods From Taxation	20
C. The Tax On Bonded Goods Does Not Interfere With The Regulation Of Foreign Commerce Or Prevent The Federal Government From "Speaking With One Voice"	23
D. The McGoldrick Decision Does Not Prevent The Taxation Of Customs Bonded Goods	25
IV. Tax Immunity Of Xerox's Copiers Discriminates Against Domestic Commerce And Unduly Burdens State And Local Governments	30
V. The United States Supreme Court Lacks Jurisdiction Of This Cause	32
CONCLUSION AND PRAYER	32

I

QUESTION PRESENTED

May a state assess a nondiscriminatory ad valorem tax under the Commerce Clause and Import-Export Clause of the United States Constitution on goods which are stored for periods of up to three years in a local customs bonded warehouse awaiting sale and shipment to a foreign country?

TABLE OF AUTHORITIES

CASES	Page
American Smelting and Refining Company v. County of Contra Costa, 77 Cal. Rptr. 570 (Ct. App. 1969) appeal dism. 396 U.S. 273, 90 S.Ct. 553	21, 22, 23, 25
Ammex Warehouse Co. v. Department of Alcoholic Beverage Control, 224 F.Supp. 546 (S.D. Cal. 1963), aff'd, 378 U.S. 124 (1964)	16
Bacon v. Illinois, 227 U.S. 504, 33 S.Ct. 299, 57 L.Ed. 615 (1913)	3, 14
Blount v. Munroe, 60 Ga. 61 (1878)	21
Boston Stock Exchange v. State Tax Commission, 429 U.S. 318 (1977)	6, 31
Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment, 347 U.S. 590, 74 S.Ct. 757, 98 L.Ed. 967 (1954)	9
Brown v. Houston, 114 U.S. 622, 5 S.Ct. 1091, 29 L.Ed. 257 (1885)	9, 14
Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 638 (1973)	26
Case of the State Freight Tax, 82 U.S. (15 Wall.) 232 (1872), 21 L.Ed. 146	14
Clarke v. Clarke, 3 Woods 408, Reprinted 5 Fed. Cas. 943 (1877)	21
[illegible] v. Town of Errol, 476 S.Ct. 473 (1886), 116 U.S. 517 (1886)	3, 14
Complete Auto Transit v. Brady, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977)	2, 6, 7, 8, 9, 29
Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies, 435 U.S. 734, 98 Sup.Ct. 1388, 55 L.Ed.2d 682 (1978)	2, 4, 5, 7, 10, 11, 12, 13, 23, 24, 25
District of Columbia v. International Distributing Corp., 331 F.2d 817 (D.C. Cir. 1964)	16
Epstein v. Lordi, 261 F.Supp. 921 (D.N.J. 1966), aff'd, 389 U.S. 29 (1967)	4, 16
Fabbri v. Murphy, 95 U.S. 191, 24 L.Ed. 468 (1877)	16
Fountain v. New Orleans Public Service, Inc., 387 F.2d 343 (5th Cir. 1967)	6, 32
Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824)	9
In Re Guggenheim, 126 F.2d 728 (1903)	27
Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 84 S.Ct. 1293, 12 L.Ed.2d 350 (1964)	16
J. Henry Schroder Banking Corp. v. Schultz, 373 F.Supp. 1283 (S.D. Tex. 1974)	3, 17

CASES Page

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979) 2, 3, 8, 9, 10, 23, 25
Kosydar v. National Cash Register Co., 417 U.S. 62, 94 Sup. Ct. 2108, 40 L.Ed.2d 660 (1974) 12, 29, 30
Leloup v. Port of Mobile, 127 U.S. 640, 648 (1888) 7
Low v. Austin, 80 U.S. (13 Wall.) 29, 20 L.Ed. 517 (1872) 16, 20, 21, 22
MacNichol Packing Co. v. U.S., 14 Ct. Cust. App. 400 (1927); 34 Op. Atty. Gen. 488 (1925) 19
McGoldrick v. Gulf Oil Corporation, 309 U.S. 414, 60 S.Ct. 664, 84 L.Ed. 840 (1940) 5, 6, 15, 20, 25, 26, 27, 28, 29
M'Cullough v. Maryland, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819) 9
Michelin Tire Corporation v. Wages, 423 U.S. 276, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976) 2, 3, 4, 5, 8, 9, 10, 11, 12, 13, 14, 16, 20, 23, 24, 30
Mobil Oil Corporation v. Commissioner of Taxes of Vermont, 445 U.S. 425, 100 S.Ct. 1223, 63 L.Ed.2d 510 (1980) .4, 10, 17, 21
Ott v. Mississippi Valley Barge Line Company, 336 U.S. 169, 69 S.Ct. 432, 93 L.Ed. 585 (1949) 9
Pullman's Palace Car Company v. Pennsylvania, 141 U.S. 18, 11 S.Ct. 876, 35 L.Ed. 613 (1891) 9
Richfield Oil Corporation v. State Board of Equalization, 329 U.S. 69, 67 S.Ct. 156 (1946) 3, 14
Sears, Roebuck & Company v. County of Los Angeles, 449 U.S. 119, 101 S.Ct. 933, 67 L.Ed.2d 106 (1981) 6, 31
State v. Pinckney, 44 So. Car. Law 474 (1857) 21
State of Minnesota v. Blasius, 290 U.S. 1, 54 S.Ct. 34, 78 L.Ed. 131 (1933) 14
Stone & Downer Co. v. United States, 19 C.C.P.A. 259 (1931) 16
Susquehanna Coal Co. v. City of South Amboy, 228 U.S. 665, 33 S.Ct. 712, 57 L.Ed. 1015 (1913) 3, 14
Transportation Co. v. Wheeling, 99 U.S. 273, 279 (1878) . 4
United States v. Ehrgott, 182 F. 267 (C.C.S.D. N.Y. 1910) 16
Western Livestock v. Bureau of Revenue, 303 U.S. 250, 254 (1938) 23

Page

UNITED STATES CONSTITUTION

Article I, Section 8, Clause 3 7
Article I, Section 10, Clause 2 10
Article VI, Clause 2 17

UNITED STATES STATUTES

Tariff Act of 1930, Ch. 497, 46 Stat. 590 5

UNITED STATES CODE

19 U.S.C. §§ 1303-1677g 20
19 U.S.C. § 1313(e) 19
19 U.S.C. § 1505 18
19 U.S.C. § 1528 24
19 U.S.C. § 1554 19
19 U.S.C. § 1557 24
19 U.S.C. § 1563(a) 19

CODE OF FEDERAL REGULATIONS

19 C.F.R. § 18.1(a) 19
19 C.F.R. § 19.1 et seq 18, 20
19 C.F.R. § 19.6(c) 20

TREASURY DECISIONS

No. 50200 (1940) 20

CONGRESSIONAL HISTORY

77 Cong. Rec., Part III, 3212-3214 27

NO. 81-1489

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

XEROX CORPORATION,
Appellant,

v.

COUNTY OF HARRIS, TEXAS, and
CITY OF HOUSTON, TEXAS,
Appellees.

On Appeal From The Texas Court of Civil Appeals

BRIEF FOR APPELLEE CITY OF HOUSTON

STATEMENT

In January, 1978, Xerox Corporation, Appellant, instituted a declaratory judgment proceeding against the City of Houston, Texas to declare approximately 4000 copier machines exempt from state ad valorem taxation because the property was stored in federal bonded warehouses. The total number of machines varied from time to time as Xerox sold machines from the bonded warehouse.

The ruling below (Texas Court of Civil Appeals, 619 S.W.2d 402) was that state and local taxing authorities' imposition of nondiscriminatory ad valorem taxes on copier machines, assembled in Mexico, held as unsold inventory in a Houston customs bonded warehouse after assembly in Mexico and awaiting sale and shipment to Latin American countries, does not violate the Import-Export or Commerce Clauses.

SUMMARY OF ARGUMENT

The imposition of the City's nondiscriminatory ad valorem tax on Xerox copiers stored under bond offends neither the Commerce Clause nor Import-Export Clause.

The tax is not an impermissible burden on commerce because it is applied to stored goods with a substantial nexus to the State of Texas and is just compensation for the benefits and protection provided by the City of Houston. The tax is fairly apportioned and does not discriminate against interstate or foreign commerce. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). The tax is neither a prohibited impost nor duty in contravention of the Import-Export Clause, and does not offend the underlying policies of the Import-Export Clause. *Michelin Tire Corporation v. Wages*, 423 U.S. 276 (1976).

A nondiscriminatory ad valorem tax is a general tax applicable to all property similarly situated. *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978). It equalizes proportionately the financial burden of providing local fire and police services, as well as "the benefits of a civilized society". *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434

(1979); *J. Henry Schroder Banking Corporation v. Schultz,* 373 F.Supp. 1283 (S.D. Tex. 1974). It is *quid pro quo* for benefits and services actually conferred. *Michelin, supra.* As such, there was sufficient nexus between the copiers and local taxing authorities. Therefore, any impact on commerce, domestic or foreign, was *de minimus* and does not inhibit the free flow of commerce.

Xerox's primary argument is that the goods were immune from the local taxation because the copiers, though stored indefinitely, never left the stream of commerce, actually or constructively. In order for the copiers to have been in actual transit they would have to have been shipped or entered with a common carrier for transportation to another state or county or have commenced the transportation process. *Coe v. Errol,* 116 U.S. 517 (1886); *Richfield Oil Corporation v. State Board of Equalization,* 329 U.S. 69 (1946). The copiers were stored for as long as three years and had not been sold or committed to a common carrier. Joint Appendix 31a, Jurisdictional Statement 19a. Storage for the business purpose and convenience of the owner renders the property taxable, and not in transit. *Bacon v. Illinois,* 227 U.S. 504 (1912); *Susquehanna Coal Company v. South Amboy,* 228 U.S. 665 (1913).

Goods in bonded warehouses are not constructively in transit. Whether goods are "in" a state or merely passing through depends on the interest being protected. *J. Henry Schroder, supra.* The legal fiction of "in transit" status in each of the cases cited by Xerox served specific and justifiable purposes. For example, the "liquor" cases involved questions of whether a delivery of liquor had occurred within the state as defined under the Twenty-

First Amendment. The Courts held that although a technical delivery had occurred, the operations of the customs laws and regulations insured against "beneficial" delivery, and treated the liquor as "in transit" for the purpose of state action under the Amendment. It is clear, however, that the courts did not consider the imports "in transit" for all purposes because they clearly recognized that bonded goods were not outside the reach of *reasonable* state regulation. *See Epstein v. Lordi,* 261 F.Supp. 921, 934 (D.N.J. 1966), *aff'd* 389 U.S. 29 (1967). The other line of cases cited by Xerox concerned the issue of when the importation concludes in order to apply tariff rates or determine whether a criminal offense had occurred. Since applicable customs laws dictated that importation was not complete until after the imports were in the actual custody of the importer, for goods stored in customs bond, the Courts employed the "in transit" fiction to bridge the gap between physical and legal importation.

Xerox treats the doctrine of in bond immunity as if it were universally applicable. It is not. There is nothing "talismanic" about the concept of custom bonded warehouses which automatically renders their stored inventory outside a state's reach when the taxation of goods is at issue. *Mobil Oil Corporation v. Commissioner of Taxes of Vermont,* 445 U.S. 425 (1980).

The "power to tax for the support of the State governments exists in the States independently of the national government; . . ." *Transportation Co. v. Wheeling,* 99 U.S. 273, 279 (1878). The City of Houston has a "significant interest" in imposing a tax on stored copiers. *Department of Revenue,* id., 748. Its impact on commerce is *de minimus. Michelin, supra* at 287. "The Commerce Clause balance tips against the tax only when

it unfairly burdens commerce by exacting more than a just share from the interstate activity." *Department of Revenue, id.* "[O]nly the clearest constitutional mandate" should lead to condemning a nondiscriminatory property tax under the Import-Export Clause. *Michelin, supra,* at 293. Against this backdrop of constitutional principles, Xerox asserts that the City's nondiscriminatory levy conflicts with the federal regulatory scheme concerning property in customs bond. There is no evidence of a clearly defined regulatory scheme which would prohibit the imposition of the City's tax on Xerox's copiers.

Xerox stored its property in a class III bonded warehouse for a period of up to three years while awaiting sales in the lagging Latin American Market. Joint Appendix, 31a. Xerox was at all times free to dispose of its property in the domestic market by the payment of customs duties. During this time the copiers benefitted from the services and protections accorded under the City of Houston's police powers.

The legislative history of customs bonded warehouses reveals that they were established to alleviate the financial hardship of a duty-paid tariff system and to promote commerce at domestic ports. Nothing in its history or in the regulative scheme, the Tariff Act of 1930, as amended, and customs regulations, evidences Congress' intent to create a federal enclave for goods stored in bond. If Congress had so intended, it would have done so as it has done in the legislative establishment of federal enclaves and Foreign Trade Zones.

The Supreme Court decision in *McGoldrick v. Gulf Oil Corporation,* 309 U.S. 414 (1940), which was expressly limited to its facts, invalidated a state tax on the

sale of crude oil, manufactured under customs bond, for use as ships' stores. The Court found a regulatory scheme, which, based on its history and purposes, precluded the imposition of the sales tax. *McGoldrick* is distinguishable from the facts in Xerox. In this case no regulatory scheme is involved. In *McGoldrick*, the sales tax constituted an impermissible burden on commerce *per se*. *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977). No such burden exists by the imposition of the City's tax.

In today's system of "Federalism" whereby local governments bear the costs of more services, they cannot afford to continue to provide such services without just compensation from those who can pay. If Xerox chooses not to pay its way in the use of public services, then it should utilize the Foreign Trade Zone and other established enclaves that are federally subsidized for that express purpose. *See Fountain v. New Orleans Public Service, Inc.*, 387 F.2d 343 (5th Cir. 1967).

Xerox's argument that it should not pay for local services fails because it would result in a discrimination against domestic commerce. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977), *Sears, Roebuck & Co. v. County of Los Angeles*, 449 U.S. 119 (1981). American labor interests suffer by the exportation of copier parts abroad for assembly. Moreover, manufacturers of domestically-assembled copiers are placed at a competitive disadvantage in the foreign markets when they must pay taxes while Xerox does not.

Finally, the Supreme Court has no appellate jurisdiction over this case. No state statute was drawn into controversy, and an independent and adequate state ground exists for upholding the decision of the Texas Court of

Civil Appeals. Therefore, the City respectfully requests that the judgment of the Texas Court of Civil Appeals be affirmed, or alternatively, that the appeal be dismissed.

I.

A NONDISCRIMINATORY AD VALOREM TAX IS AUTHORIZED BY THE UNITED STATES CONSTITUTION.

A. A Nondiscriminatory Tax is Authorized by the Commerce Clause.

The Commerce Clause provides that Congress shall have the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes". U. S. Const. art. I, § 8, cl. 3.

An ad valorem tax levied alike on all goods situated in the jurisdiction is not prohibited by the Clause. The Clause empowers Congress to regulate interstate and foreign commerce and does not operate as a bar to state taxation. Its "prohibitive effect" results from decisions of the Supreme Court and the Supremacy Clause.[1] *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978).

The Supreme Court has interpreted the Commerce Clause as prohibiting a tax which poses an impermissible burden on commerce. *Leloup v. Port of Mobile*, 127 U.S. 640, 648 (1888). In disposing of the impermissible burden issue, the Court has preferentially employed the more practical, rational and consistent test enunciated in *Com-*

1. Discussed under Part III of this Brief is the commerce-related issue of whether the tax violates the Supremacy Clause by being in conflict with a commerce-empowered congressional act or policy.

plete Auto. Mobil Oil Corporation v. Commissioner of Taxes of Vermont, 445 U.S. 425 (1980). A tax does not impermissibly burden commerce where it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce and is fairly related to the services provided by the State." *Complete Auto transit Inc. v. Brady,* 430 U.S. 274, 279 (1977).

The tax as applied to the facts of this case does not impermissibly burden commerce. Xerox contends that the property did not have a substantial nexus to the taxing jurisdiction and that the tax was not fairly related to the services provided by the City of Houston. Discrimination against commerce and unfair apportionment are not at issue.[2]

The thrust of Xerox's rational relationship argument is that it pays various fees for the use of certain public services, and that fees paid for the use of private services go indirectly toward local taxes.[3] Xerox chooses to ignore the host of public services which benefit its property and which cannot be allocated on an individual basis or according to a pricing system. The Supreme Court, however, has insisted that interstate commerce pay its own way. *Michelin Tire Corporation v. Wages,* 423 U.S. 276 (1976); *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977). In *Japan Line, supra,* the Court squarely

---

2. Xerox has judicially admitted that the tax imposed by the City of Houston is a nondiscriminatory ad valorem tax. It has also admitted that the number of copiers assessed on tax day was fairly representative of the number of copiers present daily during the tax year. Joint Appendix 16a-17a, 22a.

3. Xerox has advanced this argument at all levels in State court and has impliedly raised it before this Court. Appellant's Brief, 7, 19.

addressed a similar argument.[4] A property tax was levied on cargo containers by the State of California. The Court held, "the tax . . . is fairly related to the services provided by California, services which include not only police and fire protection, but the benefits of a trained work force and the advantages of a civilized society." At 445.

No doctrine of taxation is more fundamental and settled than that a state has the power to tax all property situated within its borders. *M'Cullough v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819); *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1 (1824); *Pullman's Palace-Car Co. v. Commonwealth of Pennsylvania,* 147 U.S. 18 (1891). Storage in the City for up to three years inherently provides the required nexus. *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment,* 347 U.S. 590 (1954); *Japan Line Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979).

Not only does the tax satisfy the standard set in *Complete Auto,* it would satisfy standards established under cases decided before *Complete Auto. See Brown v. Houston,* 114 U.S. 622 (1885); *Pullman's Palace-Car Co., supra; Ott v. Mississippi Valley Barge Line Co.,* 336 U.S. 169 (1949); *Michelin Tire Corporation v. Wages,* 423 U.S. 276 (1976).

Xerox argues that *Japan Line Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979) requires two additional inquiries: (1) does the tax result in an enhanced risk of multiple taxation and (2) does the tax prevent the federal government from "speaking with one voice"? Only

4. See Brief for Appellant at 45-47, *Japan Line Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979).

the second inquiry is at issue.[5] In *Japan Line* a property tax was imposed on cargo containers which were foreign-owned instrumentalities engaged exclusively in foreign commerce. The Court was concerned with the problem of multiple taxation which it had no authority to remedy; its effect on existing treaty provisions; and its effect on our relations with other governments. None of those concerns exist here to require application of the additional inquiries. The analogy between this case, involving a tax on domestically owned goods and *Japan Line* is "forced." *Mobil Oil Corporation, supra,* at 448. In any event, the tax on Xerox's inventory does not prevent the government from "speaking with one voice".

B. A Nondiscriminatory Tax is Authorized by the Import-Export Clause.

The Import-Export Clause provides, in part:

> "No state shall, without the consent of the Congress, lay any *Imposts* or *Duties* on Imports or Exports, except what may be absolutely necessary for executing its inspection laws. . . . (Emphasis added)
> U.S. Const. art. I § 10, cl. 2.

The nondiscriminatory ad valorem tax does not offend the Import-Export Clause and its underlying policies. The state's taxing power under the Import-Export Clause must focus on the limiting provision contained therein. The Clause prohibits the states from levying imposts or duties on imports and exports. *Michelin Tire Corporation v. Wages,* 423 U.S. 276 (1976). The terms "impost" or

5. Xerox concedes that there is no risk of multiple taxation on the international level. Appellant's Brief, Note 16.

"duty" are not self-defining and do not necessarily encompass all taxes. *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978).

As used in 1787, the terms "imposts" and "duties" were understood to be exactions upon imported goods as imports. Both were exactions directed at imports or commercial activity. Only capitation, land and general property exactions were known by the term "tax" rather than the term "duty". *Michelin, id.*, 291.

The exactions, which were in effect "transit fees", were detrimental to inland consumers and to the principles of federal government. They prohibited the federal government from "speaking with one voice" when regulating foreign commerce; reduced import revenues which were a major source of federal government funding; and enhanced disharmony among the states. These were the concerns which the Clause was adopted to alleviate. *Id.*, 283.

The *Michelin* opinion, in examining the validity of a state property tax on imported goods under the Import-Export Clause, concluded that a nondiscriminatory ad valorem tax imposed on goods not in transit was neither an "impost" nor "duty" and did not offend the underlying policies of the Clause. *Id.*, 302.

> "Nothing in the history of the Import-Export Clause even remotely suggests that a nondiscriminatory ad valorem property tax which is also imposed on imported goods that are no longer in import transit was the type of exaction that was regarded as objectionable by the Framers of the Constitution." *Id.*, 286.

Xerox argues that the City's tax fails to satisfy the first policy consideration of the Clause. Addressing that point, the *Michelin* opinion stated:

> "It is obvious that such nondiscriminatory property taxation can have no impact whatsoever on the Federal Government's exclusive regulation of foreign commerce, probably the most important purpose of the Clause's prohibition. By definition, such a tax does not fall on imports as such because of their place of origin. It cannot be used to create special protective tariffs or particular preferences for certain domestic goods, and it cannot be applied selectively to encourage or discourage any importation in a manner inconsistent with federal regulation." *Id.*, 280.

To further dispel any notions that any of the other policies were offended by the tax, the Court stated:

> "Nor will such taxation deprive the Federal Government of the exclusive right to all revenues from imposts and duties on imports and exports, since that right by definition only extends to revenues from exactions of a particular category; . . .
>
> "Finally, nondiscriminatory ad valorem property taxes do not interfere with the free flow of imported goods among the States. . . ." *Id.*, 286-288.

The *Michelin* analysis was extended to exports. A nondiscriminatory tax on exports not in transit is similarly authorized by the Clause. *Department of Revenue, supra.* Moreover, even under cases decided before *Michelin,* a property tax on goods stored exclusively for export shipment was not considered to be in violation of the Import-Export Clause. *See Kosydar v. National Cash Register Company,* 417 U.S. 62 (1979).

The Framers in drafting the Import-Export Clause were attempting to rectify an inherently unjust system, not create a new one in favor of inland states. They "did not expect residents of the ports to subsidize commerce headed inland". *Department of Revenue, supra,* at 753. The primary concern was that foreign commerce would not be impermissibly burdened. The City's tax neither discriminates for nor against imported or exported goods. The tax is imposed on all goods similarly situated, thereby equalizing tax burdens. Thus the concept of ad valorem taxation could not have been contemplated within the definition of "imposts" or "duties" as used in the Import-Export Clause. The nondiscriminatory tax on Xerox's inventory is identical to the tax in *Michelin* and is therefore not *per se* prohibited.[6]

II.

THE CUSTOMS BONDED INVENTORY WAS NOT "IN-TRANSIT."

The bonded copiers were not "in transit" when assessed by the City of Houston. Xerox argues that the copiers did not meet the "in transit" test of *Michelin.* Appellant's Brief, 20. It further argues that because the copiers were in customs custody, they were in transit in foreign commerce. *Id.,* 10. Accordingly, discussion of this point is in two parts. First, "in transit" is discussed pur-

---

6. The *Michelin* decision left open the question of whether the copiers were in transit. The City of Houston submits that they were not, as discussed under Part II of its Brief. Additionally, while it is the City's position that *Michelin* resolved the issue, discussed under Part III is whether the tax interferes with the federal government's power to "speak with one voice".

suant to the body of law arising out of traditional Commerce and Import-Export Clause concerns: whether the property is actually moving in commerce such that a tax would operate as a transit fee on goods. Second, "in transit" is discussed in terms of the legal fiction which the courts have ascribed to bonded goods in certain instances.

A. The Bonded Copiers Were Not Moving In Transit.

The federal government's strong interest in securing the free flow of commerce prevents states from levying a tax on goods in transit. A tax on "in transit" property is prohibited under both the Commerce Clause and the Import-Export Clause. Out of this prohibition a considerable body of law has developed to determine whether or not property is in transit. The law is settled and clear and applies regardless of which Clause is involved. *Case of State Freight Tax,* 82 U.S. (15 Wall.) 232 (1873); *Michelin Tire Corporation v. Wages,* 423 U.S. 276, 287-8 (1976).

By definition, goods are "in transit" when they have been shipped or entered with a common carrier for transportation to another state or have commenced the transportation process. *Coe v. Town of Errol,* 116 U.S. 517 (1886); *Richfield Oil Company v. State Board of Equalization,* 329 U.S. 69 (1946). The copiers were stored for as long as three years and had not been sold or committed to a common carrier. Joint Appendix, 31a, Jurisdictional Statement, 19a. Goods are taxable when stored for local or export sale, or otherwise stored for the business purpose and convenience of the owner. *Bacon v. Illinois,* 227 U.S. 504 (1912); *Susquehanna Coal Company v. South Amboy,* 228 U.S. 665 (1913); *Brown v. Houston,* 114 U.S. 622 (1885); *State of Minnesota v. Blasius,* 290 U.S. 1 (1933). In this case, all of the copiers

were warehoused pending export sale. Joint Appendix, 17a, 22a; Jurisdictional Statement, 17a. And, Xerox had selected Houston as the storage site because of its convenience as a distribution point. Joint Appendix, 29a. The facts are undisputed and by no reasonable application of the above principles, can Xerox's copiers be considered moving in transit.

B. Customs Bonded Storage Does Not Create "In Transit" Status.

Contrary to the argument advanced by Xerox, the customs laws do not operate to create an "in transit" status to bonded goods. The "in transit" fiction is derived from case law which has also from time to time held that bonded imports are "not a part of the common mass of property", "merely passing through the jurisdiction", or "detained at the borders". Of the cases relied on by Xerox, with the exception of *McGoldrick* (discussed *infra*), none involve the taxability of goods. The "in transit" fiction has been employed in each of these cases for specific and justifiable reasons. They provide no basis for regarding Xerox's inventory as "in transit" for tax purposes.

The "liquor" cases cited by Xerox involve the extent to which state regulatory powers may be used to prohibit the flow of bonded liquor under the aegis of the Twenty-First Amendment to the United States Constitution. That Amendment, in contradistinction to the Commerce Clause, cedes broad powers to the states in regulating or prohibiting liquor destined for "delivery or use" therein.[7]

---

7. The Twenty-First Amendment provides in pertinent part, ". . . The transportation or importation into any state, territory or possession of the United States for delivery or use therein of intoxicating liquor, in violation of the laws thereof, is hereby prohibited." U. S. Const. amend. XXI.

Hostetter v. Idlewild Bon Voyage Corp., 377 U.S. 324 (1964); *Ammex Warehouse Co. v. Dept. of Alcoholic Beverage Control*, 224 F.Supp. 546 (S.D. Cal. 1963), *aff'd* 378 U.S. 124 (1964); *District of Columbia v. International Distributing Corp.*, 331 F.2d 817 (D.C. Cir. 1964); *Epstein v. Lordi*, 261 F.Supp. 921 (D.N.J. 1966), *aff'd* 389 U.S. 29 (1967). The Twenty-First Amendment is not a basis for regulatory action where no "delivery or use" takes place within the state. *Hostetter, supra,* at 332-333. In each of these cases, while there was a *technical* delivery of liquor in the state, the operation of the customs laws and regulations insured against actual or beneficial delivery and for that purpose the goods were treated as "in transit". It is clear, however, that the Courts did not consider the imports "in transit" for all purposes because they clearly recognized that bonded goods were not outside the reach of *reasonable* state regulation. *See Epstein v. Lordi, supra,* 261 F.Supp. at 934. Moreover, these cases were burdened by the *Low v. Austin* doctrine of import immunity which has been expressly overruled by *Michelin v. Wages, supra.*

The other cases cited by Xerox concern the question of when importation was completed for the purpose of applying the tariff rates or for the purpose of determining whether a criminal offense had occurred. *Fabbri v. Murphy*, 95 U.S. 191 (1877); *Stone & Downer Co. v. U.S.*, 19 C.C.P.A. 259 (1931); *U.S. v. Ehrgott*, 182 F.Supp. 267 (C.C.S.D. N.Y. 1910). The courts held in those cases that legal importation had not occurred, even though the goods had landed on American soil and had been stored in bonded warehouses for considerable periods of time. The applicable customs law provided that importation was not complete until after the imports were

in the actual custody of the importer which was after they were released from bonded storage. Consequently, the courts employed the "in transit" fiction to bridge the gap between physical and legal importation.

Xerox treats the fiction of "in transit under customs bond" as if it were universally applicable. It is not. The fiction has been predicated on principles which simply do not exist here. "Whether [goods are] in a state or merely passing through depends on the interest being protected", *J. Henry Schroder Banking Corporation v. Schultz*, 373 F.Supp. 1283, 1292 (S.D. Tex. 1974). A nondiscriminatory tax does not subvert the federal government's interest in regulating bonded imports. (See Part III of this Brief, *infra*). There is nothing "talismanic" about the concept of customs bonded warehouses which automatically renders their stored inventory outside a state's reach when the taxation of goods is at issue. *Mobil Oil Corporation v. Commissioner of Taxes of Vermont*, 445 U.S. at 445.

III.

INVENTORY STORED IN A CUSTOMS BONDED WAREHOUSE IS NOT IMMUNE FROM LOCAL TAXATION.

The Supremacy Clause provides in part, that "This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the Supreme Law of the Land. . . ." U.S. Const. art. VI, cl. 2.

Customs bonded goods are not *ipso facto* immune from local taxation. The tax must either violate an express act of Congress or conflict with a scheme of regulation to be invalid under the Constitution. The City's tax on copiers

stored under customs bond conflicts with neither a congressional act nor a scheme of regulation.

A. Custom Bonded Warehouses.

The warehouse which housed Xerox's inventory was designated as a class III customs bonded warehouse and operated pursuant to Title 19, sections 19.1 through 19.10 of the Code of Federal Regulations. Jurisdictional Statement, 16a; Joint Appendix, 11a, 14a. The privately-owned warehouse was operated for the public in the storage of both bonded and non-bonded goods. Joint Appendix, 17a, 22a. The sole difference between bonded and nonbonded storage is that bonded property is physically segregated and is maintained under the supervision of customs officials. *Id.* Contrary to the representation of Xerox at page 20 of its Brief, the warehouse is not in a federal enclave, nor is it in a Foreign Trade Zone. *Id.*

Dutiable imports may be entered into a customs bonded warehouse, duty free. 19 U.S.C. § 1505. However, prior to entry, *physical* custody is taken by customs officials to inspect and certify that the goods comply with entrance requirements and to secure payment of the duties. It is at this point the bond is established. The bond is surety that the duties will be paid regardless of what happens to the goods, short of re-exportation. Once the government is assured that all regulations have been met and that the payment of any duties have been secured, they are technically released from the physical custody of customs officials and are then entered into bonded warehouses where they are maintained under the joint supervision of customs and the warehouse proprietor. The importer-owner is free to pay customs duties and effect the goods'

release into domestic commerce or have them released for export. Allowing the goods to remain in storage is merely a service to the importer while securing the payment of the duties. No formal or protective custody is retained.[8]

Custom bonded warehouses were instituted to ameliorate the consequences of a revenue act designed to bolster tariff revenues. Appendix, CONG. GLOBE, 29th Cong., 1st Sess., 792 (1846). This act required duty-paid entry of all imports. To acquire the cash, it was frequently necessary, especially for smaller merchants, to dispose of the imported goods immediately upon importation, regardless of the market conditions. *Id.* Because the economy was insecure, there was concern over the adverse effects of this policy. Legislative history reveals that customs bonded warehouses were initially enacted to accomplish three objectives, while securing government revenues. This system of deferred duty payment firstly, ensured that smaller importers did not remain at a competitive disadvantage. Secondly, it encouraged use of American ports

---

8. *See* 19 U.S.C.A., §§ 1313(e), 1563(a); 19 C.F.R. § 18.1(a); 19 U.S.C.A. § 1554 which indicate the term "in bond" is not synonymous with customs custody.

19 U.S.C. § 1313(e) concerns the use of imported salt for the curing of fish by vessels licensed to engage in the fisheries while the salt is still under bond and the duties have not been paid. Upon proof that the salt has been used for curing fish the duties are remitted. Clearly, the salt cannot be in custom's custody while being used aboard vessels to cure fish. *MacNichol Packing Co. v. U. S.*, 14 Ct. Cust. App. 400 (1927); 34 Op. Atty. Gen. 488 (1925).

19 U.S.C. § 1563 concerns the abating or refunding of duties upon merchandise while being inspected, or appraised. 19 C.F.R. § 18.1(a) concerns the status of transporting carriers. 19 U.S.C. § 1554 concerns the status of bonded goods transported through contiguous countries. Conclusively, all three indicate the extent of the government's interest in securing payment of the duties and its concern over piracy of the goods before the duties have been paid.

by authorizing duty-free storage of imports held for exportation. Finally, it assured the availability of supplies should the need arise. *Id.*

B. The Customs Laws Do Not Immunize Bonded Goods From Taxation.

The Tariff Act of 1932, as amended, and the customs regulations laws do not of their own force exempt from state taxation property stored in customs bonded warehouses. 19 U.S.C. §§ 1303-1677g; 19 C.F.R. § 19.1, *et seq.* A footnote to Customs Regulation § 19.6(c) is the only reference to tax exemption. Section 19.6(c) reads as follows:

> "Merchandise covered by a notice of lien filed by the carrier shall not be released until the lien has been satisfied or discharged.[11]"

Footnote 11 states:

> "Imported goods in bonded warehouses are exempt from taxation or judicial process of any state or subdivision thereof." (*See* T.D. 50200)

Treasury Decision 50200 sets out the text of *McGoldrick v. Gulf Oil Corporation*, 309 U.S. 414 (1940). The nonapplicability of *McGoldrick* to the facts of this case is discussed *infra*. *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1871), which held that imports and exports are exempt from a nondiscriminatory tax under the Import-Export Clause, was expressly overruled by *Michelin Tire Corporation v. Wages*, 423 U.S. 276 (1976). There is no authority for finding Congressional legislation engrafted in a footnote.

Intent to preempt state taxation will not be implied. An explicit declaration from Congress is required before preemption of state action will be found. *Mobil Oil Corporation v. Commissioner of Taxes of Vermont*, 445 U.S. 425 (1980).

Notwithstanding congressional silence, Xerox asserts that the footnote contains substantially the same language that has appeared in previous customs regulations, and by that reason alone, carries the force of law. Each edition of the Customs Regulations published between 1915 and 1937 contained an express provision exempting "imported goods in bonded warehouses" from taxation.[9] Joint Appendix 58a, 66a, 77a, 93a. The marginal notes for each provision contain reference to *Low v. Austin*, three lower court decisions and a treasury decision.[10] None of these decisions involve a state tax on imports held in cus-

---

9. It is submitted that the Customs Regulations enacted for that period operated essentially as field guides for customs officers and were not intended to have the effect of mandatory law. Each edition of the Customs Regulations contains the introductory statement: "Prescribed for the Instruction and Guidance of Customs Officers". *See* Joint Appendix 50a, 59a, 67a, 82a.

10. The three cases cited were *Clarke v. Clarke*, 3 Woods 408, reprinted in 5 Fed. Cas. 943 (1877); *Blount v. Munroe*, 60 Ga. 61 (1878); and *State v. Pinckney*, 44 So. Car. Law 4/4 (1857). In both *Clarke* and *Blount*, the tax was levied on timber awaiting export shipment. The courts expressly relied on *Low v. Austin* as the basis for invalidating a nondiscriminatory tax on exports. In *Blount* the court said: "Whether the reasoning on which these adjudications rests be sound or not, it is not for us to inquire, as we have no power to enforce our view should they be variant from those of the Supreme Court of the United States." 60 Ga. at 64-65. In *State v. Pinckney*, the tax was upheld because the property had been placed on the market for sale. The court by way of dicta reiterated the *Low v. Austin* "original package" doctrine.

The treasury decision was essentially an opinion letter holding that a municipality could not inspect customs records to obtain information on which to base taxes. *American Smelting & Refining Co.*, 77 Cal. Rptr. 570 (Ct. App. 1969).

toms bond. In each of the lower court opinions, the holding or dictum was predicated on the overruled *Low v. Austin* rationale for exempting imports and exports.

In *American Smelting & Refining Company v. The County of Contra Costa,* 77 Cal. Rptr. 570 (Ct. App. 1969), the court considered the question: to what extent does footnote 11 operate as law. After a thorough analysis of its precedent, the court "concluded that the footnote has no more weight than the precedent on which it rests." *Id.* at 598.

Xerox's argument that the footnote is tantamount to law is specious. As noted by the *American Smelting* court in a footnote of its own:

> "Were it not for the *Gulf Oil* case, [discussed *infra*] the conclusion that this sentence embodied in general instructions for the administration of bonded warehouses, could expand the exemption from state and local taxation beyond the constitutional premises upon which it was predicated would not be worthy of comment." *Id.* at 598, n.28.

The City of Houston's interests in exacting its fair share of taxes for services provided does not conflict with the federal government's interest in regulating the flow of imported goods through customs bonded warehouses. The tax does not impair the federal government's interest in any customs duties to which it may be entitled. Customs officers are not hampered in the exercise of their duties under the regulatory scheme. The tax does not prevent or hinder the flow of imports, either into or out of the country. American industry is not hurt by the tax. In fact, the tax helps to put American-produced copiers on a competitive footing in that such copiers are subject to local ad valorem taxes when stored for export distribution.

Kosydar v. National Cash Register Co., 417 U.S. 62. Xerox has neither alleged nor proved that the tax affects the use of American facilities as international warehouses. Nor has it demonstrated that the tax in any way impairs its ability to compete in the foreign market. The gravamen of Xerox's complaint is that the tax increases its cost of doing business. This complaint carries *no* constitutional weight. The purpose of the Commerce Clause is not to relieve those engaged in commerce from their just share of the tax burden even though it increases the cost of doing business. *Western Livestock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938); *Michelin v. Wages, supra; Department of Revenue v. Association of Washington Stevedoring Cos., supra.* There is no reason why the interest of municipal government should stand on a different footing than those of labor, utilities, suppliers, transportation companies, etc. No one would seriously contend that the free flow of commerce demands the sacrifice of these private exactions. *American Smelting, supra* at 590. As with all other costs, the costs of public services must be considered as part of the overall costs of doing business.

C. The Tax on Bonded Goods Does Not Interfere with the Regulation of Foreign Commerce or Prevent The Federal Government from "Speaking with One Voice".

The City's tax on bonded inventory neither prevents the federal government from "speaking with one voice," an Import-Export Clause concern, nor interferes with the government's exclusive power to regulate commerce, a Commerce Clause concern. The policies behind both Clauses are identical. *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979). Xerox's arguments to the

contrary may be summarized, addressed and disposed of as follows:

1. "The federal government has certainly regulated commercial relations concerning goods passing through customs bonded warehouses for reexport—it has said they are not to be subject to taxes or customs duties. See 19 U.S.C. § 1557(a) (1976)." Appellant's Brief, 24.

The laws and regulations governing bonded warehouses *do not* immunize bonded goods from state and local taxes. Moreover, the customs laws do not immunize such goods from other federal taxes unless expressly provided. *See* 19 U.S.C. § 1528.

2. "Texas seeks to interject itself as to those goods, however, and claims the right to speak on foreign commercial relations for goods that happen to be warehoused there and to say that it can burden them with its taxes." Appellant's Brief, id.

A tax which exacts its fair share for services provided does not burden commerce. *Department of Revenue, id.*, 748. "The Import-Export Clause . . . cannot be read to accord imported goods preferential treatment that permits escape from uniform taxes imposed without regard to foreign origin for services which the State supplies." *Michelin, supra* at 287.

3. "[Japan Line] noted a national policy to remove impediments to the use of containers similar to Congress' policy to 'unfetter' goods passing through customs bonded warehouses. . . . So, too, it would make 'speaking with one voice' impossible." Appellant's Brief, 25.

Congress has evidenced no national policy of treating copiers differently from other property. The containers in

Japan Line were the subject of an international agreement. They were taxed twice, both by the United States and Japan, and were subject to the taxing powers of more than one state. However, only the State of Texas taxed Xerox's copiers, and at no time during their storage were they subject to tax by any other state.

In sum, Xerox has provided no sound basis for concluding that the ad valorem tax on its copiers burdens the federal government in the conduct of foreign affairs. No burdens, impediments, nor interferences with the scheme of customs bonded regulation have been demonstrated, and as such, its argument is nothing more than an abstraction. *See Department of Revenue, id.*, 746.

D. The *McGoldrick* Decision does not Prevent the Taxation of Customs Bonded Goods.

The only case decided by the Supreme Court involving the taxability of property under customs bond was *McGoldrick v. Gulf Oil Corporation*, 309 U.S. 414 (1940). While the Court held, under the particular circumstances of that case, that fuel oil manufactured in bond and used as supplies to vessels engaged in foreign commerce were not subject to a tax on its sale, the Court expressly left undecided the issue of whether property under customs bond would be immune from state taxation. *Id.*, 429. *See American Smelting & Refining Company v. The County of Contra Costa*, 77 Cal. Rptr. 570, 597 (Ct. App. 1969). The City submits that the *McGoldrick* holding, limited to its facts, does not control the outcome of this case. The factual situations presented by these cases are critically different.

In *McGoldrick*, New York City imposed a tax on the sale of fuel oil. The oil had been manufactured from

imported crude petroleum under customs manufacturing bond which required as a condition for entry that the oil be exported. The tax was levied when the oil was sold and delivered as supplies to vessels engaged in foreign commerce. The laws in effect at that time were the Tariff Act which authorized the duty-free withdrawal of oil sold as ships' supplies; the Revenue Act which exempted such oil from the imposition of its tax; and the Customs regulations which generally governed the entry and withdrawal of bonded goods and which specifically provided that imported goods in bonded warehouses were exempt from state taxation. The Court determined that the legislation, when read together, afforded a comprehensive scheme "for the regulation of the importation of the crude petroleum and of its control while in the course of manufacture in bond into fuel oil and its delivery as ship's stores to vessels in foreign commerce." *Id.*, 426-427. The Court concluded that, in light of the purpose of the congressional regulation, the state tax impermissibly infringed on congressional action.

When questions of federal preemption are involved, each case must turn on its own particular circumstances and the special regulatory scheme in question. *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638 (1973). In this case the facts and present regulatory scheme do not support the application of *McGoldrick*.

The *McGoldrick* Court explicitly predicated its finding of a regulatory scheme on the history and purpose for the congressional legislation. Its purpose, being to encourage importation of crude petroleum for use in foreign commerce and "to enable American refineries to meet foreign competition", was confirmed by congressional

reports.[11] They indicated that, after the Revenue Act imposed a tax on crude, American refineries lost all of the fuel oil business of ocean bound vessels to foreign competitors. To remedy this problem, Congress took immediate steps to amend the Act so that imported oil sold to vessels of foreign trade would not be taxed. *Id.*, 427. Thus, the scheme of regulation in *McGoldrick* addressed the isolated problem of a particular industry.

In this case, the only legislation involved are the Tariff Act and the customs regulations, neither of which exempt bonded goods from taxation as did the customs regulations in *McGoldrick*. Xerox contends that by their operation alone, Congress intended to confer a special competitive advantage to Xerox. This precise argument was addressed in *In Re Guggenheim*, 126 F. 728 (1903). In *Guggenheim* the controversy involved a tariff provision which authorized duty-free importation of metal for refining under customs bond. The importer argued that the Tariff Act was designed to confer a special competitive advantage by entitling it to retain ten per cent (10%) of its refined metal for domestic sale. In concluding that the Tariff Act and customs regulations by themselves afforded no special competitive advantage to a particular class of importers, the Court stated:

---

11. Senator Harrison, who moved for consideration of the Bill, delivered the following testimony:

> "It was found that many of the vessels which carry on the foreign trade heretofore had bought their fuel oil in this country, but since the passage of a tax act they have changed their practice and are filling abroad in the ports of foreign countries, and we are losing that trade. A provision is recommended by the Committee that in the case of fuel oil, ships stores, and so forth, as involved in this class of foreign trade, the tax shall not be imposed." 77 Cong. Rec., Part III, 3212.

> "It is undoubtedly true that the Act of 1897 was intended not only 'to provide revenue,' but also 'to encourage the industries of the United States.' But this latter intent was effectuated by levying protective duties, and this its twenty-ninth section did not do. It did not impose, but excepted from duties, and this for a reason which is quite apparent. Metals imported and dealt with under provisions do not enter into the markets of the United States, and consequently do not come into competition with any of their industries. This, we are convinced, was the real and only ground upon which the exemption to smelters and refiners was accorded, and there is nothing whatever in the act to support the contention that it was designed that this particular class of importer should, to any extent be especially privileged to put upon the market of the United States free of duty, a commodity which, when imported by others, was by the same act made subject to duty. Such a purpose cannot be, upon mere conjecture, imputed to Congress. It would not be in furtherance of the protective policy of the act. It would be subversive of it." At 730-731.

In *McGoldrick,* the customs regulation expressly prohibited a tax on bonded imports. However, even with such an express prohibition, the Court chose to limit the regulation's applicability to the facts before it.

> "The customs regulation prescribing (sic) the exemption from state taxation, *when applied to the facts of this case,* states only what is implicit in the congressional regulation of commerce presently involved." At 429 (Emphasis added).

Xerox does not even have an implied prohibition to hang its hat on.

In *McGoldrick*, the tax was imposed on oil which was irrevocably committed to foreign export. The oil had been imported under a manufacturing customs bond on the condition that it be re-exported. *Id.* 425. Unlike the copiers, which Xerox had the practical option of diverting to domestic use, the imported oil was legally committed to export.[12] Moreover, the New York tax fell on the incidence of *sale* to vessels of foreign commerce.

It is suggested that apart from the regulatory aspect, the tax in *McGoldrick* was invalid for two other reasons. First, the tax affected property moving in export transit. *See Kosydar v. National Cash Register Company*, 417 U.S. 62 (1974). Second, it is highly unlikely that the tax could satisfy the requirements set out in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977). Both the requirements of "nexus" and "benefits and protections" would constitute strong barriers to the sale tax's validity as an impermissible burden on commerce *per se*.

In *Xerox*, the tax fell on copiers which, as a matter of fact and law, had not been committed to export. Jurisdictional Statement, 19a; Joint Appendix, 17a, 22a. Throughout their period of storage, the copiers received municipal services for which the tax exacted just compensation.

In conclusion, Xerox radically differs from *McGoldrick* in that no regulatory scheme exists which expresses Congressional intent to exempt copiers from state taxation, and the tax on Xerox's copiers does not *per se* burden commerce.

---

12. Xerox did in fact sell a limited number of copiers to an agency of the U.S. government. Joint Appendix, 33a.

IV.

TAX IMMUNITY OF XEROX'S COPIERS DISCRIMINATES AGAINST DOMESTIC COMMERCE AND UNDULY BURDENS STATE AND LOCAL GOVERNMENTS.

Xerox's business operation involved the export of copier component parts to Mexico for assembly, their return to the United States and shipment to Houston where they were stored until sold and delivered to Latin American customers. From their intial exportation to reexportation, the copiers were under customs bond. Xerox utilized this circuitous export-import-export arrangement to take advantage of the cheaper labor costs of Mexican workers, the more favorable United States Customs laws and Houston's excellent distribution facilities. Joint Appendix, 27a-33a, 40a-43a.

Xerox's method of operation was in derogation of American labor interests. A significant portion of the production process takes place in Mexico. Copiers which could have been assembled in the United States are instead assembled in Mexico where labor costs are cheaper.

Xerox argues that it should be given preferential tax treatment so that it may effectively compete in foreign commerce. Xerox's competitors, however, who manufacture their machines exclusively within the United States are disadvantaged by the scheme of taxation which favors the kind of operation conducted by Xerox. Its competitors' copiers, stored for export distribution, would be subject to local taxes when Xerox's would not be. *Kosydar v. National Cash Register,* 417 U.S. 62 (1974); *Michelin v. Wages,* 423 U.S. 276 (1976). Such competitive ad-

vantage is suggested by the fact that there are only three companies which manufacture their export copiers exclusively within the United States and compete in the same market with Xerox. Joint Appendix, *id.* These companies have only a small share of that market.

In essence, Xerox is seeking to discriminate against domestically-assembled copiers in favor of its foreign assembled copiers. The Commerce Clause prohibits any form of discrimination in commerce. *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318 (1977). Recently, this Court affirmed the decision of the California State Court which held that a tax which discriminates against goods of local origin in favor of imports is unconstitutional. *Sears, Roebuck & Company v. County of Los Angeles,* 449 U.S. 119 (1981).

Over a three year period, Xerox sold and distributed more than 10,000 copiers out of the Houston warehouse. Most of the copiers remained in Houston for substantial periods of time during which essential and comprehensive City services were provided. Many of these services were of the kind that only a highly developed urban community such as Houston could provide. Xerox argues that it should not pay for these services.

In today's economy, the costs that local governments must bear in providing services has increased enormously. Local governments cannot afford to go uncompensated for services rendered to those who *can* pay. If Xerox chooses not to pay its own way for the use of local public services, then it has a reasonable and attractive alternative, which it has already employed. Congress, through the establishment of Foreign Trade Zones and other federal enclaves, has created tax-free havens on a feder-

ally subsidized basis. *See* 19 U.S.C. 81a, *et seq; Fountain v. New Orleans Public Service, Inc.*, 387 F.2d 343 (5th Cir. 1967).

V.

THE UNITED STATES SUPREME COURT LACKS JURISDICTION OF THIS CAUSE.

Xerox's appeal is not taken in conformity with 28 U.S.C. 1257(2) which confers jurisdiction on this Court when the validity of a state statute is drawn into question as being repugnant to the Constitution and other federal laws or treaties.

The City reiterates its position that Xerox has not complied with proper state procedures preliminary to availing itself to this Court's jurisdiction. (*See* City of Houston's Motion to Dismiss) The City further contends that an independent and adequate state ground exists for upholding the decision of the Texas Court of Civil Appeals and adopts arguments contained in the Brief of Appellees—Harris County.

CONCLUSION AND PRAYER

In consideration of the foregoing arguments, the Appellee, City of Houston, submits that the tax assessed on Xerox's property is valid under the United States Constitution and further that this Court has no appeal jurisdiction; and Appellee prays that the judgment of the

Texas Court of Civil Appeals be affirmed or, in the alternative, that the appeal be dismissed.

Respectfully submitted,

F. J. COLEMAN, JR.
City Attorney

JAY D. HOWELL, JR.
Senior Assistant City Attorney

CHERYL HELENA CHAPMAN
Senior Assistant City Attorney
Counsel of Record

BELINDA TURNER SAULSBERRY
Assistant City Attorney

P. O. Box 1562
Houston, Texas 77251
(713) 222-5151

Counsel for Appellee,
City of Houston

Appellant's Reply Brief

Office - Supreme Court, U.S.
FILED
OCT 28 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1489

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

XEROX CORPORATION,

Appellant,

—v.—

COUNTY OF HARRIS, TEXAS, and
CITY OF HOUSTON, TEXAS,

Appellees.

APPEAL FROM THE TEXAS COURT OF CIVIL APPEALS

APPELLANT'S REPLY BRIEF

ALFRED H. HODDINOTT, JR.
800 Long Ridge Road
Stamford, Connecticut 06904
(203) 329-8700
Counsel for Appellant

October 28, 1982

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
I. THE COMMERCE CLAUSE	2
A. Foreign Commerce	3
B. Customs Bonded Warehouses	4
C. Treasury Regulations	5
D. The McGoldrick Case	6
II. THE IMPORT-EXPORT CLAUSE	7
A. "In Transit"	7
B. Xerox' Copiers Were "In Transit"	8
C. "One Voice"—The Michelin Case	9
CONCLUSION	11

TABLE OF AUTHORITIES

Cases	PAGE
American Smelting & Refining Co. v. County of Contra Costa, 271 Cal. App. 2d 437, 77 Cal. Rptr. 570 (1969), *appeal dismissed*, 396 U.S. 273 (1970)	6-7
Board of Trustees of the University of Illinois v. United States, 289 U.S. 48 (1933)	5n
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977)	9
Department of Revenue v. Association of Washington Stevedoring Companies, 435 U.S. 734 (1978)	9
Heard v. City of Dallas, 456 S.W.2d 440 (Tex. Civ. App. 1970)	3
Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1938)	2n
Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979)	3, 9, 10n
MacNichol Packing Co. v. United States, 14 Ct. Cust. App. 400 (1927)	5n
Maryland v. Louisiana, 451 U.S. 725 (1981)	5
McGoldrick v. Gulf Oil Corp., 309 U.S. 414 (1940)	2, 5, 6-7, 11
Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976)	7, 9-10
National Distillers Products Corp. v. City and County of San Francisco, 141 Cal. App. 2d 651, 297 P.2d 61, *cert. denied*, 352 U.S. 928 (1956)	6
Orr v. Orr, 440 U.S. 268 (1979)	2n
Stedman v. Georgetown Savings & Loan Association, 595 S.W.2d 486 (Tex. 1979)	3

PAGE

Tremlett v. Adams, 54 U.S. (13 How.) 295 (1852) 5n

United States v. Ehrgott, 182 F. 267 (C.C.S.D.N.Y. 1910) 5n

Constitutions

UNITED STATES

Article I, Section 8, Clause 3 2

Article I, Section 10, Clause 2 7

Statutes and Rules

UNITED STATES CODE

19 U.S.C. § 1556 (1976) 5

UNITED STATES SUPREME COURT RULES

Rule 28.1 ..... 1n

Miscellaneous

78 Cong. Rec. 9777-79, 9853 (1934) 4n

8 Fed. Reg. 8099 (1943) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1489

XEROX CORPORATION,

Appellant,

—v.—

COUNTY OF HARRIS, TEXAS, and
CITY OF HOUSTON, TEXAS,

Appellees.

APPEAL FROM THE TEXAS COURT OF CIVIL APPEALS

APPELLANT'S REPLY BRIEF

Appellant Xerox Corporation ("Xerox")[1] submits this memorandum in reply to the briefs filed by the appellees County of Harris, Texas and City of Houston, Texas ("the County" and "the City"), and the brief *amicus curiae* filed by the International Association of Assessing Officers ("the IAAO").[2]

---

1 Xerox' listing pursuant to Supreme Court Rule 28.1 is set forth in Appellant's Brief ("Xerox Br.") at ii.

2 Xerox believes that most of the constitutional arguments in those briefs were either anticipated and rebutted in its brief on the merits or are irrelevant. This short response addresses only the most remarkable of appellees' other assertions. By limiting its response, however, Xerox does not accede to the remainder of appellees' claims.

While the County also argues that there is an "independent state ground of decision," County Br. at 8-13, the Texas Court of Civil

I.

THE COMMERCE CLAUSE

[With respect to the illegality of appellees' taxes under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, Xerox has established that:

1. its copiers were in *foreign* commerce;
2. Congress rigidly controls the customs bonded warehouse where they were stored, and intends that goods stored there be free from state taxes;
3. Treasury regulations bar state taxation of goods in those warehouses; and accordingly,
4. pursuant to *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414 (1940) ("*McGoldrick*"), a state tax on those copiers is unconstitutional. Xerox Br. at 10-20.]

Appeals decided *constitutional* issues, not just when it denied Xerox injunctive relief, but also when it entered judgment against Xerox on the counterclaims. Jurisdictional Statement Appendix ("J.S.A.") at 10a. With respect to the procedural questions the County raises concerning the form of injunctive relief, the lower court specifically held that "[o]ur disposition of previous points of error makes these objections irrelevant . . . ." J.S.A. at 9a.

> Where the state court does not decide against a petitioner or appellant upon an independent state ground, but deeming the federal question to be before it, actually entertains and decides that question adversely to the federal right asserted, this Court has jurisdiction to review the judgment if, as here, it is a final judgment. We cannot refuse jurisdiction because the state court might have based its decision, consistently with the record upon an independent and adequate non-federal ground.

Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 98 (1938) (footnote omitted); *see also Orr v. Orr*, 440 U.S. 268, 276-77 (1979).

A. Foreign Commerce

Appellees essentially ignore the fact that this case involves *foreign* commerce, but contrary to the City's assertion, City Br. at 29, the trial court said the copiers were "committed to reexport" and had "not left the palpable flow of foreign trade." J.S.A. at 12a. The trial court's factual determinations must be upheld unless they are "manifestly erroneous." *Heard v. City of Dallas*, 456 S.W.2d 440, 443 (Tex. Civ. App. 1970); *see also Stedman v. Georgetown Savings & Loan Association*, 595 S.W.2d 486, 488 (Tex. 1979). The Texas Court of Civil Appeals never challenged those facts; indeed, it confirmed that "[n]one of the imported copiers from the customs bonded warehouses were ever sold to customers for domestic use." J.S.A. at 3a.

Appellees' assumption that the law is the same when applied to either interstate or foreign commerce, e.g., City Br. at 8-10, County Br. at 22, is also wrong.

> The premise of appellee's argument is that the Commerce Clause analysis is identical, regardless of whether interstate or foreign commerce is involved. This premise, we have concluded, must be rejected. When construing Congress' power to "regulate Commerce with foreign Nations," a more extensive constitutional inquiry is required.

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 446 (1979).

Factually and legally, this case concerns foreign commerce, with all of its implications.

B. Customs Bonded Warehouses

While appellees try to minimize the consequences that flow from the fact that these goods were in a customs bonded warehouse, they confirm Xerox' summary of the reasons why Congress created the warehouses, i.e., to "unfetter commerce." *Compare* Xerox Br. at 11-14 *with* City Br. at 18-20 *and* County Br. at 27.[3] The City also concedes that legal importation of goods in those warehouses

> had not occurred, even though the goods had landed on American soil and had been stored in bonded warehouses for considerable periods of time. The applicable customs law provided that importation was not complete until after the imports were in the actual custody of the importer which was after they were released from bonded storage. Consequently, the courts employed the "in transit" fiction to bridge the gap between physical and legal importation.

City Br. at 16-17. Therefore, the unique characteristics of goods in a customs bonded warehouse are essentially undisputed.[4]

---

3 For instance, the County concedes that one of the purposes for the warehouses was "to allow storage of imported goods which have a final foreign destination pending transportation," County Br. at 27, but it also suggests that Xerox "could have reduced or avoided the County's tax at its own initiative by limiting its inventory to its reasonable needs." *Id.* at 25. The chilling effect on foreign commerce that that suggestion would have, and its conflict with Congress' intent that the warehouses be used to increase rather than decrease trade, are self-evident.

4 The City finds significant the fact that Xerox' copiers were not in a Foreign Trade Zone. City Br. at 5, 18. But the City concedes that Foreign Trade Zones are "tax-free havens," *id.* at 31, and Congress has said that the only significant difference between them and bonded warehouses is that the trade zones eliminate burdensome paperwork connected with the warehouses. 78 Cong. Rec. 9777-79, 9853 (1934). They are therefore identical for the purposes of these constitutional issues.

C. Treasury Regulations

To counter the force of the relevant Treasury regulations that bar state taxation, Xerox Br. at 15-16, 17-18, appellees contend, *inter alia*, that when the Secretary of the Treasury promulgated those regulations, he somehow ignored the congressional mandate to "establish such rules and regulations as may be necessary." 19 U.S.C. § 1556 (1976). They claim that the regulations were merely "field guides" (City Br. at 21 n.9; County Br. at 34)—some sort of law review articles for customs officers. But that is belied by the Treasury Department's statement that

> [t]he following regulations are made and published for the purpose of carrying out the customs and navigation laws. They shall be strictly observed and complied with in all cases . . . .
>
> . . . .
>
> These regulations are issued pursuant to the respective statutory provisions cited in parentheses at the end of each section, and pursuant to the order of the Secretary of the Treasury . . . .

8 Fed. Reg. 8099 (1943). This Court has repeatedly recognized that Treasury regulations have the force of law,[5] and "the State may not trespass on the authority of the federal agency." *Maryland v. Louisiana*, 451 U.S. 725, 751 (1981). Furthermore,

> [t]he customs regulation prescribing the exemption from state taxation, when applied to the facts of the present case, states only what is implicit in the congressional regulation of commerce presently involved. The state tax in the circumstances must fail as an infringement of the congressional regulation of the commerce.

McGoldrick, 309 U.S. at 429. The regulations are binding and bar state taxation.

---

5 *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414, 426-27 (1940); *Board of Trustees of the University of Illinois v. United States*, 289 U.S. 48 (1933); *Tremlett v. Adams*, 54 U.S. (13 How.) 295 (1852); *see also United States v. Ehrgott*, 182 F. 267, 272 (C.C.S.D.N.Y. 1910) (L. Hand, J.) and *MacNichol Packing Co. v. United States*, 14 Ct. Cust. App. 400, 403 (1927).

D. The McGoldrick Case

Xerox has established the applicability of the *McGoldrick* case, and already countered most of appellees' arguments. Xerox Br. at 16-20. Appellees do not claim *McGoldrick* is wrong or should be overruled; they therefore try to distinguish it, as they must. They fail.[6]

The County's attempt to distinguish *McGoldrick* is marred by its claim that "[t]he only case which has recently examined *McGoldrick* on its merits as applied to an ad valorem tax is *American Smelting and Refining Company v. County of Contra Costa*," [271 Cal. App. 2d 437, 77 Cal. Rptr. 570 (1969), *appeal dismissed*, 396 U.S. 273 (1970)]. County Br. at 31. Whatever weight the opinion of an intermediate California court may have, the County continues to blissfully ignore that court's decision in *National Distillers Products Corp. v. City and County of San Francisco* 141 Cal. App. 2d 651, 297 P.2d 61, *cert. denied*, 352 U.S. 928 (1956), which held an ad valorem tax similar to appellees' invalid.

American Smelting did not ignore *National Distillers*. In discussing that case, the *American Smelting* court said that where (as here) it was not feasible for property in a customs bonded warehouse to enter domestic commerce "because of the manner in which it had been prepared and packaged," it was "in the stream of exports which are not available for or connected with domestic commerce on the lien date." 77 Cal. Rptr. at 599. *American Smelting* therefore agreed with *National Distillers* and exempted similar goods from state taxation. That is applicable here, for the trial court found that Xerox' copiers

> occupied a place both in the federal regulatory scheme and in foreign commerce similar to the ore-*cum*-metal

---

6 For example, they claim that *McGoldrick* was "limited to its facts." City Br. at 5, 28; County Br. at 31-32; *see also* IAAO Br. at 5. But all the *McGoldrick* Court stated was the obvious premise, applicable to every case, that it was deciding the issues on the facts presented to it. It did not limit the applicability of its legal analysis. If appellees' assertions were true, practically every case this Court decides would have no precedential value.

> that was "committed to reexport" in *American Smelting & Refining Co. v. County of Contra Costa* . . . and to the fuel oil that was committed to consumption as ship's stores in *McGoldrick v. Gulf Oil Corp.* . . . .

J.S.A. at 12a. *American Smelting* enhances rather than diminishes the force of *McGoldrick* as applied to this case.

II.

THE IMPORT-EXPORT CLAUSE

[Appellant's brief established that these taxes violate the Import-Export Clause, U.S. Const. art. I, § 10, cl. 2, because:

1. goods "in transit" are immune from state taxation, *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 290 (1976) ("*Michelin*");
2. Xerox' copiers were "in transit"; and
3. whether the goods were in transit or not, these taxes are invalid because they prevent the federal government from speaking with "one voice" on foreign commercial affairs, *id.* at 285. Xerox Br. at 20-25.]

A. "In Transit"

Appellees' discussion of the Import-Export Clause is highlighted by a concession on a central issue of the case. The City agrees that states cannot constitutionally tax goods that are "in transit," City Br. at 14; it succinctly stated:

> The federal government's strong interest in securing the free flow of commerce prevents states from levying a tax on goods in transit. A tax on "in transit" property is prohibited under both the Commerce Clause and the Import-Export Clause.

Well said. We have nothing to add.

B. Xerox' Copiers Were "In Transit"

The City agrees that goods in customs bonded warehouses such as Xerox' copiers are "in transit":

> Since applicable customs laws dictated that importation was not complete until after the imports were in the actual custody of the importer, for goods stored in customs bond, the Courts employed the "in transit" fiction to bridge the gap between physical and legal importation.

City Br. at 4.

To avoid the consequences of federal custody, appellees try to apply old cases concerning the point at which goods in domestic commerce had "ceased transit" to the foreign commerce in a bonded warehouse in this case, and conclude that Xerox' copiers were not in transit. City Br. at 14-17; County Br. at 17-21. That is legally and factually unsound. *See* Xerox Br. at 22-24. However long these copiers were in the customs bonded warehouse (actually it was anywhere from a few days to three years, J.S.A. at 4a), these goods never became part of the common mass of property within the state. They were in transit in foreign commerce by operation of Congress' directives concerning the status of goods in those warehouses. Appellees would have the Court revert to mechanical and artificial concepts concerning the extent of stoppage as the goods pass through the warehouses to determine these constitutional issues. But how long could they permissibly pause under appellees' theory—a year? a week? a day? And as to Xerox' copiers, which were stored for varying periods of time, what time span was applicable for each machine? These artificial criteria should not be applied in the face of a clear congressional mandate.

Xerox' copiers were "in transit." That fact alone, coupled with the City's concession that the state cannot tax goods "in transit," should conclude the case without more.

C. "One Voice"—The Michelin Case

Finally, the County apparently looks upon the *Michelin* case and *Department of Revenue v. Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978), as magic potions to cure all of its constitutional ills. Upon analysis, they're really only aspirin—they may make the County feel better, but the constitutional infirmities remain.

Michelin involved tires and tubes that had already passed through the customs barrier and were stored in a domestic warehouse and destined for domestic markets. They were not goods in U.S. government custody in a customs bonded warehouse bound for foreign shores.[7] And *Department of Revenue*, in addition to being unrelated to bonded warehouses, was specifically limited to *services*, not goods. 435 U.S. at 757. Neither case involved the pervasive regulatory scheme present here. The cases are, therefore, factually inapplicable.

But the County tries to extend *Michelin* and read out of the law the necessity for a substantial nexus to the state before it can tax. County Br. at 6-7. But that is required even in interstate commerce cases, *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), and is certainly required when foreign commerce is involved. *Japan Line, Ltd. v. County of Los Angeles* 441 U.S. 434, 445-46 (1979). And *Michelin* does not, as the County would have us believe, permit state taxation on virtually all property. *Japan Line* belies that.

---

7 "Indeed," the Court said in *Michelin*, "importers of goods destined for inland States can easily avoid even [nondiscriminatory ad valorem property taxes] in today's world. Modern transportation methods such as air freight and containerized packaging, and the development of railroads and the Nation's internal waterways, enable importation directly into the inland States." 423 U.S. at 288. How? Obviously, as here, under customs bond.

What *Michelin* does stand for is that while state taxes on goods not in transit are not automatically invalid, 423 U.S. at 290, they are not automatically valid either; they must pass a three part test. When appellees finally approach that test's application to their taxes on Xerox' copiers, however, they become almost silent.[8] Appellees' response to Xerox' analysis, Xerox Br. at 24-25, showing that the tax violates the *Michelin* test because it prevents the federal government from "speaking with one voice" on foreign commercial affairs, needs no additional reply.

Michelin condemns rather than saves these taxes.

---

8 *See* City Br. at 23-25. The County's brief at 24-26 virtually ignores the "one voice" test, but does discuss the question of multiple taxation, despite the fact that Xerox expressly disclaimed that issue because it is a domestic corporation. Xerox Br. at 25 n.16. However, if Xerox were a Japanese copier manufacturer and appellees applied their taxes, it clearly would have been subject to multiple taxation and the tax would fall because even the *risk* of multiple taxation will invalidate a tax. *Japan Line*, 441 U.S. at 446. A stopover in Harris County, Texas, hardly seems the appropriate place to permit the imposition of a property tax on the *full* value of the property, since this Court would have no authority to bar a similar tax by a foreign country. But blanket affirmance here, without more, would permit that to happen.

CONCLUSION

This case is controlled by the following principles:

1. In creating customs bonded warehouses, Congress intended that goods stored there be free from state taxation.
2. Treasury regulations bar state taxation of goods in those warehouses.
3. The *McGoldrick* case is applicable and should be followed.
4. State taxation of goods "in transit" is prohibited, and Xerox' copiers were "in transit."
5. These taxes prevent Congress from speaking with "one voice" in foreign commercial affairs.

For appellees to prevail, they must negate every one of those principles. If they fail to disprove *even one*, they lose. They have failed as to all five.

This Court should reverse the decision below.

Respectfully submitted,

ALFRED H. HODDINOTT, JR.
800 Long Ridge Road
Stamford, Connecticut 06904
(203) 329-8700

Counsel for Appellant

Amicus Brief

MOTION FILED

JUL 19 1982

No. 81-1489

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

XEROX CORPORATION,

Appellant,

vs.

COUNTY OF HARRIS, TEXAS, and
CITY OF HOUSTON, TEXAS,

Appellees.

On Appeal From The Texas Court Of Civil Appeals

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE INTERNATIONAL ASSOCIATION OF ASSESSING OFFICERS

JAMES F. GOSSETT
Association Counsel
International Association of
Assessing Officers
1313 East 60th Street
Chicago, Illinois 60637-9990
(312) 947-2053
Attorney for Amicus Curiae, IAAO

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

In The

Supreme Court of the United States

October Term, 1981

XEROX CORPORATION,

Appellant,

vs.

COUNTY OF HARRIS, TEXAS, and CITY OF HOUSTON, TEXAS,

Appellees.

On Appeal From The Texas Court Of Civil Appeals

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE INTERNATIONAL ASSOCIATION OF ASSESSING OFFICERS

The International Association of Assessing Officers hereby respectfully moves for leave to file a brief amicus curiae in the above-captioned case in support of the Appellees. The consent of the attorneys for the Appellees has been obtained, and they have advised counsel for the International Association of Assessing Officers in telephone conversations that they will forward their written consent to the Clerk of the Supreme Court. The consent of the attorney for the Appellant was requested but refused.

The International Association of Assessing Officers has approximately 8,500 members. Most of the members are employees of state and local governments. The members reside in all 50 states and in other countries. The Association is primarily interested in property tax assessment. The eight objectives of IAAO as stated in the IAAO Constitution, Art. 1, Sec. 2, amended as of June 27, 1980, are as follows: (1) to improve the standards of assessment practice; (2) to educate those engaged in assessment practice; (3) to elevate the standards of personnel requirements in assessment offices; (4) to educate the general public in matters relating to assessment practice; (5) to engage in research and to publish the results of studies in assessment administration; (6) to provide a clearinghouse for the collection and distribution of useful information relating to assessment practice; (7) to cooperate with other public and private agencies interested in improving assessment administration; and (8) to promote justice and equality in the distribution of the property tax burden.

Although most of the members of the Association are engaged in assessment administration for property tax purposes at the state and local levels of government, the Association is not just a "trade union" for assessors, but rather, is a nonprofit educational institution interested in promoting proper and equitable taxation. In that role, the Association has often been invited to present testimony to Congress and to state and local legislative bodies when proposals relating to the property tax have been considered. In a related effort, the Association has also begun to submit amicus curiae briefs in court cases that might have a substantial impact on the property tax and/or the assessment profession.

The case before the Court could have such a substantial impact. As noted in the Appellant's Jurisdictional

Statement (P. 18), the "$9 million worth of copiers that Xerox stored in a customs bonded warehouse is but a microcosm of what is undoubtedly hundreds of millions of dollars worth of goods similarly stored throughout the country." The Appellant, *inter alia*, argues that all of these goods should be declared to be automatically exempted from state and local ad valorem property taxation by virtue of their being stored under customs bond. If the Court should rule as requested by the Appellant, the state and local governments which employ most of the members of the amicus Association would lose a significant amount of badly needed revenue. Moreover, exemptions of the sort proposed by the Appellant tend to result in increased taxation of non-exempt properties and/or a reduced level of state and local government services to the citizenry, which developments are of concern to all state and local government employees, and particularly those who administer the property tax, as well as others who have dedicated themselves to making the property tax a more viable and equitable method of taxation.

The amicus Association is in a unique position to assess for the Court the probable impact of the Appellant's exemption proposal. The Association is aware of the extent to which property has already been exempted from ad valorem taxation in the United States and around the world, and of the damage, in terms of assessment inequity and reduced state and local government services, which has been partly caused by current exemptions. Yet, the Association is aware that responsible and humane public policy requires that many property tax exemptions continue to exist, and the Association can view the potential costs and benefits of the Appellant's proposal with a certain objectivity that neither of the parties to the case can be expected to demonstrate.

Because of the Association's interest in the outcome of this case and because the Appellees cannot fairly be expected to address in a complete fashion the broader implications of the Appellant's position, the International Association of Assessing Officers respectfully requests leave to file the attached brief amicus curiae. The arguments set forth in the brief amicus curiae are relevant to disposition of this case.

Respectfully submitted,

JAMES F. GOSSETT
Association Counsel
International Association of
Assessing Officers
1313 E. 60th Street
Chicago, Illinois 60637-9990
(312) 947-2053
Attorney for Amicus Curiae, IAAO

TABLE OF AUTHORITIES

Cases

American Smelting and Refining Co. v. County of Contra Costa, 271 Cal. App. 2d 437, 77 Cal. Rptr. 570, *appeal dismissed*, 396 U.S. 273 (1969) 10
Ammex Warehouse Co. of San Ysidro, Inc. v. Department of Alcoholic Beverage Control, 224 F. Supp. 546 (S.D. Cal. 1963), *aff'd*, 378 U.S. 124 (1964) 7
Calvert v. Zanes-Ewalt Warehouse, Inc., 502 S.W.2d 689 (Tex. 1973) 11
Department of Revenue v. Association of Washington Stevedoring Companies, 435 U.S. 734 (1978) 10, 11
District of Columbia v. International Distributing Corp., 331 F.2d 817 (D.C. Cir. 1964) 7, 8
Fabbri v. Murphy, 95 U.S. 191 (1877) 7
Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964) 7
Independent Warehouses, Inc. v. Scheele, 331 U.S. 70 (1947) 11
Kosydar v. National Cash Register Co., 417 U.S. 62 (1974) 11
Low v. Austin, 80 U.S. (13 Wall.) 29 (1872) 11
McGoldrick v. Gulf Oil Corp., 309 U.S. 414 (1940) 5, 6, 7, 8
Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976) 10
National Distillers Products Corp. v. City and County of San Francisco, 141 Cal. App. 2d 651, 297 P.2d 61, *cert. denied*, 352 U.S. 928 (1956) ... 7, 8, 9
Stone & Downer Co. v. United States, 19 C.C.P.A. 259 (1931) 7
United States v. Ehrgott, 182 F. 267 (C.C.S.D.N.Y. 1910) 7

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS	1
SUMMARY OF ARGUMENT	3
ARGUMENT:	
This Court Should Hold That Storing Of Items In U.S. Customs Bonded Warehouses Does Not, In And Of Itself, Preclude State And Local Authorities From Assessing And Levying A Tax On Those Items, And That Traditional Tests For Determining When Items Are In Import-Export Commerce, And Exempt From State And Local Property Taxation, Are Applicable To Items Stored In Such A Manner	4
CONCLUSION	13

Statutes and Rules

United States Code
19 U.S.C. §1556 (1976) 5
19 U.S.C. §1557(a) (1976) 5
Code of Federal Regulations
19 C.F.R. §19.6(c) and n.11 (1981) 5
19 C.F.R. and notes 5

Other Authorities

Advisory Commission on Intergovernmental Relations, Payments in Lieu of Taxes on Federal Property (Washington, D.C.: 1981) 12

In The

Supreme Court of the United States

October Term, 1981

XEROX CORPORATION,

Appellant,

vs.

COUNTY OF HARRIS, TEXAS, and CITY OF HOUSTON, TEXAS,

Appellees.

On Appeal From The Texas Court Of Civil Appeals

BRIEF AMICUS CURIAE OF THE INTERNATIONAL ASSOCIATION OF ASSESSING OFFICERS

INTEREST OF AMICUS CURIAE

The International Association of Assessing Officers has approximately 8,500 members. Most of the members are employees of state and local governments. The members reside in all 50 states and in other countries. The Association is primarily interested in property tax assessment. The eight objectives of IAAO as stated in the IAAO Constitution, Art. 1, Sec. 2, amended as of

June 27, 1980, are as follows: (1) to improve the standards of assessment practice; (2) to educate those engaged in assessment practice; (3) to elevate the standards of personnel requirements in assessment offices; (4) to educate the general public in matters relating to assessment practice; (5) to engage in research and to publish the results of studies in assessment administration; (6) to provide a clearinghouse for the collection and distribution of useful information relating to assessment practice; (7) to cooperate with other public and private agencies interested in improving assessment administration; and (8) to promote justice and equity in the distribution of the property tax burden.

The Association is not just a "trade union" for assessors, but rather, is a nonprofit educational institution interested in promoting proper and equitable taxation. Consequently, IAAO is concerned about assessment inequities that will result if the Court holds that the copiers stored by Xerox Corporation in a customs bonded warehouse were thereby automatically exempted from local property taxation. IAAO believes that neither the U.S. Constitution, nor any federal statute or regulation, nor any consideration of appropriate public policy, requires such an automatic exemption, that the Court should hold accordingly, and that traditional tests for determining when items are in import-export commerce and exempt from state and local property taxation should be used to resolve this case, namely: does the tax burden commerce; were the goods in transit?

SUMMARY OF ARGUMENT

We submit that the Court of Civil Appeals of Texas was correct in concluding that storing of items in U.S. customs bonded warehouses does not, in and of itself, preclude state and local authorities from assessing and levying a tax on those items. The Supreme Court has developed tests for determining when items are in import-export commerce, and exempt from state and local property taxation under the U.S. Constitution. These tests, which must be applied to the facts of each case, include: does the tax burden commerce; were the goods in transit? Since the Appellant can cite no federal statute or regulation that specifically grants an automatic exemption from state and local ad valorem taxation to all items stored in customs bonded warehouses, the traditional tests are applicable to such items. Moreover, it is not in the public interest for this Court to recognize an automatic exemption from state and local ad valorem taxes for all goods stored under customs bond, in view of the assessment inequities and denial of sorely needed revenues to state and local governments, that would result from the creation of such an exemption. Accordingly, this Court should hold that neither the U.S. Constitution, nor federal statutes and regulations, automatically exempt all items stored in U.S. customs bonded warehouses from state and local ad valorem taxation, and that traditional tests for determining when items are in import-export commerce, and therefore exempt from state and local property taxation, are applicable to items stored in such a manner.

ARGUMENT

THIS COURT SHOULD HOLD THAT STORING OF ITEMS IN U.S. CUSTOMS BONDED WAREHOUSES DOES NOT, IN AND OF ITSELF, PRECLUDE STATE AND LOCAL AUTHORITIES FROM ASSESSING AND LEVYING A TAX ON THOSE ITEMS, AND THAT TRADITIONAL TESTS FOR DETERMINING WHEN ITEMS ARE IN IMPORT-EXPORT COMMERCE, AND EXEMPT FROM STATE AND LOCAL PROPERTY TAXATION, ARE APPLICABLE TO ITEMS STORED IN SUCH A MANNER.

In this suit for a declaratory judgment filed by Xerox Corporation, the Court of Civil Appeals of Texas held, *inter alia*, that Xerox Corporation's storage of copiers in a customs bonded warehouse did not, *in and of itself*, preclude local authorities from assessing and levying nondiscriminatory ad valorem taxes upon that property under the United States Constitution absent federal legislation or regulation to the contrary. Finding no such federal legislation or regulation, and rejecting other contentions raised by the corporation, the Court of Civil Appeals upheld assessment and taxation of the copiers in the case at bar and ordered judgment for the defendants. *County of Harris v. Xerox Corporation*, 619 S.W.2d 402 (Tex. Civ. App. 1981).

We agree that storing of items in U.S. customs bonded warehouses does not, in and of itself, preclude state and local authorities from assessing and levying a tax on those items. We believe that traditional tests for determining when items are in import-export commerce, and exempt from state and local taxation, are applicable to items stored in such a manner, and that the court below properly decided to consider such tests in determining whether a tax could be assessed and levied against the copiers in the case at bar. However, we do not take a

position as to whether the copiers stored by Xerox Corporation in the instant case should, in fact, be considered exempt from taxation under traditional tests.

Xerox Corporation, in arguing that items stored in customs bonded warehouses are thereby automatically exempted from state and local ad valorem taxation, has referred to federal statutes freeing goods in customs bonded warehouses from the payment of duties to the federal government, and delegating to the Secretary of the Treasury the power to regulate those warehouses, 19 U.S.C. § 1556, 1557(a) (1976). These statutes contain no reference to an exemption from state and local taxes, however. In seeking authority for such an exemption, Xerox Corporation actually relies upon a footnote to a regulation promulgated by the Secretary in carrying out his regulatory duties relating to customs bonded warehouses, 19 C.F.R. § 19.6(c) and n. 11 (1981). That footnote clearly was not intended to create law. Rather, an examination of 19 C.F.R. and the other footnotes contained therein indicates that such footnotes were used to reference what the compilers of the Code of Federal Regulations considered to be existing law. The footnote in question refers to T.D. 50200, which refers to the decision of the Supreme Court in *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414 (1940), and it is really that court case upon which Xerox must base its argument.

In *McGoldrick*, Xerox contends, the Supreme Court has recognized that state and local taxes on goods stored in customs bonded warehouses are *per se* unconstitutional. However, *McGoldrick* was expressly limited to its facts, and those facts are clearly distinguishable from the situation in the case at bar. 309 U.S. 414, 429. In *McGoldrick*, the Court denied New York State the right to impose a sales tax on imported crude oil located in a customs bonded warehouse. However, the oil in *McGold-*

rick was irrevocably committed to foreign commerce. 309 U.S. 414, 422. By contrast, the copiers in the instant case had been neither sold nor otherwise legally committed to transportation abroad. The Court of Civil Appeals of Texas made an express finding to that effect. 619 S.W.2d 402, 406. Neither does Xerox make any claim to the contrary.[1]

Furthermore, while other distinctions between *McGoldrick* and the present case might also be drawn, as ably done by Appellees in their brief on Motion to Dismiss or Affirm (Pp. 8-9), we think that the most telling distinction is that *McGoldrick* was based on a genuine customs regulation (not a footnote) which is no longer in effect, and which specifically provided that "imported goods in bonded warehouse are exempt from taxation under the

---

[1] Xerox contends that the copiers could not be sold for use in the United States because:

1. All printing and instructions were in Spanish and Portuguese;
2. Many of the machines required 50-cycle electricity, which is not readily available in the United States;
3. Some of the machines did not have Underwriters Laboratory or Canadian Standards Association (UL/CSA) approval;
4. The copiers and their component parts were such that they could not participate in the Xerox "Retrofit" program in the United States, a program Xerox uses to continuously update copiers in service with improvements as they are developed; and
5. Import would require paying customs duties of 5 percent of the value of the copiers and 5 percent of the value of certain technical assistance. (Appellant's Brief, P. 6)

While the above considerations may indicate that Xerox originally intended the copiers for export, they do not actually preclude sale of the copiers within the United States. Much less do they constitute a legal commitment of the items to export, such as that which occurred in *McGoldrick*.

general laws of the several States." 309 U.S. 414, 426, 429. It is the inability of Xerox to cite any similar regulation applicable to the case at bar that ultimately must doom to failure that corporation's argument for an automatic exemption.

In addition to *McGoldrick*, Xerox relies on a number of other court decisions as support for its argument in favor of an automatic exemption from state and local taxes for items stored in U.S. customs bonded warehouses, but those cases are just as distinguishable from the case at bar. The courts in some of those cases relied on *McGoldrick* as authority for their decisions (*Ammex Warehouse Co. of San Ysidro, Inc. v. Department of Alcoholic Beverage Control*, 224 F. Supp. 546 (S.D. Cal. 1963), *aff'd*, 378 U.S. 124 (1964); *National Distillers Products Corp. v. City and County of San Francisco*, 141 Cal. App. 2d 651, 297 P.2d 61, *cert. denied*, 352 U.S. 928 (1956)). All of those cases also involved federal statutory and regulatory schemes relating to customs bonded warehouses, which were very different from the one in the instant case (*Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964); *Fabbri v. Murphy*, 95 U.S. 191 (1877); *District of Columbia v. International Distributing Corp.*, 331 F.2d 817 (D.C. Cir. 1964); *Stone & Downer Co. v. United States*, 19 C.C.P.A. 259 (1931); *United States v. Ehrgott*, 182 F. 267 (C.C.S.D.N.Y. 1910); *Ammex Warehouse Co. of San Ysidro, Inc. v. Department of Alcoholic Beverage Control*; *National Distillers Products Corp. v. City and County of San Francisco*). Some of those cases involved state and local regulatory schemes much more likely to burden commerce than the nondiscriminatory tax involved in the case at bar (*Hostetter v. Idlewild Bon Voyage Liquor Corp.*; *Ammex Warehouse Co. of San Ysidro, Inc. v. Department of Alcoholic Beverage Control*), and, most importantly, only two of those cases even dealt with state and local taxa-

tion (*District of Columbia v. International Distributing Corp.*; *National Distillers Products Corp. v. City and County of San Francisco*).

Of the state and local tax cases relied upon by Xerox in addition to *McGoldrick*, one, *District of Columbia v. International Distributing Corp.*, involved a sales tax, rather than an ad valorem property tax. As noted in the Appellees' brief on the Motion to Dismiss or Affirm (Pp. 8-9), a sales tax, which is a tax levied directly upon commerce, raises concerns that do not exist for an ad valorem tax. More importantly, perhaps, *District of Columbia* involved the interpretation of a vague sales tax statute which was passed by Congress against a background of prior recognition by Congress and in international law and custom, that no local sales tax could be levied, as proposed by the District, against sales to foreign embassies and international organizations. 331 F.2d 817, 820. In that case, the court merely interpreted the taxing statute to avoid a specific result that Congress could not have intended, that foreign diplomatic personnel become subject to local taxation. The court did not recognize a general exemption from local taxation for items in customs bonded warehouses.

Finally, the case of *National Distillers Products Corp. v. City and County of San Francisco* is distinguishable from the case at bar, even though that case did involve personal property taxes. Not only did that case involve customs statutes quite different from those involved in the instant case, but *National Distillers Products* concerned items that were stamped, packed, and labeled for export, having been shipped by common carrier from Baltimore to California only so that they could be loaded aboard a ship bound for other Pacific shores. The court considered that fact and the fact that the property stayed in California very briefly, being shipped abroad

immediately after tax day, and the court very reasonably concluded that under the specific facts of the case, the products were actually in the course of movement aboard ship for export on tax day. 297 P.2d 61, 62, 63. Thus, the *National Distillers Products* case is questionable authority for recognition of an exemption in the very different situation of the case at bar, and it is certainly no authority for granting automatic exemptions from state and local taxes to all items stored in customs bonded warehouses.

Since Xerox Corporation cannot point to specific language in existing federal statutes or regulations indicating that items stored in customs bonded warehouses should be exempt from state and local ad valorem taxation, and since the corporation cannot cite a court decision providing for such a blanket exemption, the Appellant has resorted to quoting a number of authorities for the proposition that items stored in customs bonded warehouses are under the continuous supervision and control of U.S. Customs and are "detained at the border." Granting that goods stored are under federal government control, however, we would argue that the goods are not thereby automatically made exempt from state and local taxation, any more than goods under the temporary control, but not ownership, of any other federal government agency on tax day are exempt, absent a specific congressional declaration to that effect. It would be no less incongruous to hold that all goods in customs bonded warehouses are exempt from state and local taxation than it would be to hold that packages which have been held back by the Postal Service because of insufficient postage are automatically exempt. If "federal custody" means federal ownership for state and local tax purposes, owners of personal property throughout the country will be mailing goods to themselves on assessment day in order to avoid taxation.

Appellant also deprecates the significance of a court decision relied upon by the Court of Civil Appeals of Texas in the instant case, *American Smelting & Refining Co. v. County of Contra Costa*, 271 Cal. App. 2d 437, 77 Cal. Rptr. 570, *appeal dismissed*, 396 U.S. 273 (1969) (Decision in the case at bar, 619 S.W.2d 402, 406). Xerox argues that the court in *American Smelting* rejected taxation of merchandise destined for foreign commerce. (Appellant's Brief, P. 19). However, the court only rejected taxation of certain goods under customs bond, where the owner had a legal obligation to export them. 271 Cal. App. 2d 437, 481. With respect to other items under customs bond, the court upheld state and local taxation. Thus, the Court of Civil Appeals of Texas was correct in relying upon *American Smelting* as authority for holding that no automatic exemption from state and local ad valorem taxation exists for items stored under customs bond.

In the decision below, we believe that the Court of Civil Appeals of Texas was right to reject the argument made by Xerox that an automatic exemption from state and local property taxation was required for goods stored under customs bond, by the U.S. Constitution and by federal statutes and regulations. The appellate court correctly noted that courts have previously established criteria to determine whether state and local tax exemptions for goods in commerce are required by the U.S. Constitution, and we believe that these traditional tests should apply to items stored in customs bonded warehouses, just as they apply to items stored in other warehouses, absent specific federal legislation or regulations to the contrary, which we do not find in the instant case. See *Department of Revenue v. Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978); *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976);

Kosydar v. National Cash Register Co., 417 U.S. 62 (1974); *Independent Warehouses, Inc. v. Scheele*, 331 U.S. 70 (1947); *Calvert v. Zanes-Ewalt Warehouse, Inc.*, 502 S.W.2d 689 (Tex. 1973).

The decision of the Supreme Court in the *Michelin* case, overruling *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1872), and upholding the constitutionality of a nondiscriminatory ad valorem tax on imports, is particularly significant in the case at bar, as is the *Stevedoring* decision, upholding nondiscriminatory taxation of exports. These cases and the others cited above indicate that goods stored in customs bonded warehouses, like goods stored in other warehouses, cannot be considered exempt from state and local ad valorem taxation under the U.S. Constitution without consideration of the following issues *based on the facts of each individual case*: did the tax burden commerce; were the goods in transit?

In its brief on appeal, Xerox Corporation invites the Supreme Court to bypass consideration of the above issues. Most worrisome to the Amicus IAAO, Appellant is arguing that this Court should approve an automatic exemption for goods under customs bond that would ultimately discriminate against other goods in commerce, creating assessment inequities at the state and local level and at the same time denying much needed revenue to hard pressed state and local governments.

As admitted by Xerox in its Jurisdictional Statement on appeal (P. 18), the "$9 million worth of copiers that Xerox stored in a customs bonded warehouse is but a microcosm of what is undoubtedly hundreds of millions of dollars worth of goods similarly stored throughout the country." Added to the enormous amount of property that is already exempt from state and local taxation, either because it is federally owned or because fed-

eral law requires an exemption,[2] the exemption Xerox proposes would constitute a burden to state and local governments and likely would contribute to the constant raising of taxes on nonexempt property and the reduction of state and local government services, which have accompanied the sizable increases we have seen lately in the types of property and the types of property owners that are eligible for ad valorem tax exemptions.

When one property is exempted from taxation, owners of other property tend to bear a greater burden as a result. Thus, not only will competitors of Xerox be placed at a disadvantage by the proposed automatic exemption for goods in customs bonded warehouses (that is, those who manufacture their copiers exclusively within the United States), but also, owners of nonexempt property in general will be at a disadvantage. Further promoting of this kind of assessment inequity, which allows some property owners to pay no tax at all, while their neighbors are forced to settle for a reduction in state and local government services, or bear more than their fair share of the ever-increasing cost of government services, is not in the public interest at this time and on the facts of this case.

---

[2] According to a recent study, federally owned real property alone is the largest single category of exempt property in the United States, and estimates are that the total amount of exempt real property in the United States is approximately $800 billion worth of real estate—about one-third of the real property in America. That equals enough property to provide state and local governments with at least $15 billion a year in additional desperately needed revenue if all exempt property were taxed on the same basis as other holdings. See ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, PAYMENTS IN LIEU OF TAXES ON FEDERAL PROPERTY (Washington, D.C.: 1981).

CONCLUSION

We respectfully conclude that this Court should hold that storing of items in U.S. customs bonded warehouses does not, in and of itself, preclude state and local authorities from assessing and levying a tax on those items, and that traditional tests for determining when items are in import-export commerce, and exempt from state and local property taxation, are applicable to items stored in such a manner. However, we take no position as to whether the copiers stored by Xerox Corporation in the instant case should, in fact, be considered exempt from taxation under traditional tests.

Respectfully submitted,

JAMES F. GOSSETT
Association Counsel
International Association of
Assessing Officers
1313 E. 60th Street
Chicago, Illinois 60637-9990
(312) 947-2053
Attorney for Amicus Curiae, IAAO

Reply Brief

Office - Supreme Court, U.S.
FILED
AUG 2 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1489

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

XEROX CORPORATION,

Appellant,

—v.—

COUNTY OF HARRIS, TEXAS, and
CITY OF HOUSTON, TEXAS,

Appellees.

APPEAL FROM THE TEXAS COURT OF CIVIL APPEALS

APPELLANT'S OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE INTERNATIONAL ASSOCIATION OF ASSESSING OFFICERS

ALFRED H. HODDINOTT, JR.
800 Long Ridge Road
Stamford, Connecticut 06904
(203) 329-8700

Counsel for Appellant

July 30, 1982

TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	1
II. THE LEGAL CRITERIA	2
III. THE ASSOCIATION'S BRIEF	3
IV. CONCLUSION	4

TABLE OF AUTHORITIES

Cases

PAGE

National Distillers Products Corp. v. City and County of San Francisco, 141 Cal. App. 2d 651, 297 P.2d 61, *cert. denied,* 352 U.S. 928 (1956) 4n

On Lee v. United States, 343 U.S. 924 (1952) (mem.) .. 2, 4

Rules

UNITED STATES SUPREME COURT RULES

Rule 36.3 ..... 2, 4

Miscellaneous

Comment, *The Amicus Curiae,* 55 Nw. U.L. Rev. 469 (1960) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1489

XEROX CORPORATION,

Appellant,

—v.—

COUNTY OF HARRIS, TEXAS, and
CITY OF HOUSTON, TEXAS,

Appellees.

APPEAL FROM THE TEXAS COURT OF CIVIL APPEALS

APPELLANT'S OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE INTERNATIONAL ASSOCIATION OF ASSESSING OFFICERS

I. INTRODUCTION

This is an appeal from the decision of the Texas Court of Civil Appeals, 619 S.W.2d 402 (1981), that state ad valorem taxes were constitutional as applied to goods continuously in foreign commerce and stored in customs bonded warehouses. Appellant Xerox Corporation ("Xerox") has withheld its consent to the filing of a brief *amicus curiae* by the International Association of Assessing Officers ("the Association") because

the Association's brief does not satisfy the relevant criteria for such a submission.*

II. THE LEGAL CRITERIA

Supreme Court Rule 36.3 requires an *amicus* brief to state "the nature of the applicant's interest, set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case . . . ."

Burdened by an ever increasing docket, the Court has indicated to litigants, both through the language of Rule 36.3 and in its memoranda, that it does not expect parties to routinely consent to every motion for leave to file an *amicus* brief, but rather looks to them to indicate to the Court, by withholding that consent, when they believe a particular brief will not assist the Court in its considerations. In *On Lee v. United States*, 343 U.S. 924 (1952) (mem.), Justice Frankfurter, while condemning what was then the practice of the Solicitor General to resist all such applications, set forth what was expected of litigants:

> For the Solicitor General to withhold consent automatically in order to enable this Court to determine for itself the propriety of each application is to throw upon the Court a responsibility that the Court has put upon all litigants, including the Government, preserving to itself the right to accept an amicus brief in any case where it seems unreasonable for the litigants to have withheld consent. If all litigants were to take the position of the Solicitor General, either no amici briefs (other than those that fall within the exceptions of Rule 27) would be

---

* This objection does not address the contentions of the Association's brief on the merits of the case. Since the Association simply endorses the briefs filed by Appellees, Xerox believes it has already responded to the Association's allegations.

> allowed, or a fair sifting process for dealing with such applications would be nullified and an undue burden cast upon the Court. Neither alternative is conducive to the wise disposition of the Court's business. The practice of the Government amounts to an endeavor, I am bound to say, to transfer to the Court a responsibility that by the rule properly belongs to the Government.

The role of the *amicus* is not to display mere academic interest or to purvey propaganda.

> His role as court informer for the benefit of otherwise inadequately represented interests limits the amicus to the presentation of material relevant to these effects, not presented equally well by the parties. Judicial economy further limits him to *efficient* presentation of *necessary* matters *significantly* relevant, not *sufficiently* presented by the parties . . . . Thus his material must be necessary and compelling. (emphasis in original) (footnote omitted)

Comment, *The Amicus Curiae,* 55 Nw. U.L. Rev. 469, 470 (1960).

The Association's motion and brief do not satisfy these requirements.

III. THE ASSOCIATION'S BRIEF

The Association brings nothing new to the case. It offers no new facts. Actually, it offers no facts at all. All of the Association's discussion is in the abstract, for it specifically disavows any interest in the outcome of the case as applied to Xerox; "we take no position as to whether the copiers stored by Xerox Corporation in the instant case should, in fact, be considered exempt from taxation under traditional tests." Brief at 13.

Nor does the Association offer new law. *Every* case and *every* statute cited in its brief were previously cited by Xerox.

And every case but one* was cited by the Appellees in their briefs. The Association devotes most of its brief to praising the lower court opinion (*id.* at 3, 4, 6, 10), approving Appellees' briefs ("distinctions . . . ably done", *id.* at 6), or attempting to distinguish the cases Xerox has cited. The brief therefore does *not* "set forth facts or questions of law that have not been . . . presented by the parties . . . ." Sup. Ct. R. 36.3. It is just a restatement of what Appellees have repeatedly argued before. That does not satisfy the Rule.

The Association has no direct interest in the case since the impact of the Court's decision on its members will be remote, at best. While it claims it is "not just a 'trade union' for assessors," the Association is in fact made up of 8500 employees of state and local governments. Motion at 2. Its members are employees of the parties really concerned—state and local governments—rather than interested parties themselves. Their interest does not satisfy Rule 36.3.

Finally, the Association cannot claim that its position has not been represented in this litigation. It wants to see state taxing power over goods in customs bonded warehouses established for all states. But that is exactly what Appellees seek, what they have forcefully argued for four years, and what they have adequately represented.

IV. CONCLUSION

Xerox submits that it has reasonably and responsibly followed the Court's criteria in objecting to the Association's motion. When measured against Rule 36.3 and Justice Frankfurter's mandate in *On Lee v. United States*, *supra*, the Association's brief is inadequate and will burden rather than

---

* As in their Motions to Affirm or Dismiss, Appellees' briefs ignore *National Distillers Products Corp. v. City and County of San Francisco*, 141 Cal. App. 2d 651, 297 P.2d 61, *cert. denied*, 352 U.S. 928 (1956).

assist the Court. Accordingly, the motion for leave to file a brief *amicus curiae* should be denied.

Respectfully submitted,

ALFRED H. HODDINOTT, JR.
800 Long Ridge Road
Stamford, Connecticut 06904
(203) 329-8700

Counsel for Appellant.

Docket Sheet

NO. 81-1489-ASX	TITLE Xerox Corporation, Appellant v. County of Harris, Texas and City of Houston, Texas

DOCKETED	COURT
February 9, 1982	Court of Appeals of Texas, First Supreme Judicial District

DATE	PROCEEDINGS AND ORDERS
	Counsel for Appellant: Alfred H. Hoddinott, Jr.
	Counsel for Appellees: Edward J. Landry, Cheryl Helena Chapman
February 9, 1982	Statement as to jurisdiction filed. (Record filed).
Mar. 16, 1982	Motion to dismiss or affirm filed by the City of Houston.
Mar. 17, 1982	DISTRIBUTED. 4-2.
Mar. 23, 1982	Motion of appellee County of Harris, Texas to dismiss or affirm filed. (D).
Mar. 23, 1982	Reply brief for the appellant filed. (D).
Apr. 5, 1982	Probable jurisdiction NOTED.

Apr. 28, 1982	Joint appendix filed.
May 19, 1982	Brief for the appellant filed.
May 27, 1982	Order extending time for all appellees to file their briefs on the merits until July 23, 1982.
June 4, 1982	Motion of appellees for divided argument and for additional time for oral argument filed.
June 21, 1982	The motion of appellees for divided argument and for additional time for oral argument is DENIED.
July 19, 1982	Motion of International Association of Assessing Officers for leave to file a brief as amicus curiae filed.
July 23, 1982	Brief of appellee City of Houston filed.
July 23, 1982	Brief of appellee County of Harris filed.
Aug. 2, 1982	Appellant's objection to motion for leave to file brief amicus curiae of the International Association of Assessint Officers filed.
Aug. 25, 1982	CIRCULATED.
Sept. 9, 1982	The motion of International Association of Assessing Officers for leave to file a brief as amicus curiae is GRANTED.
Oct. 28, 1982	Reply brief for the appellant filed. (D).
Nov. 10, 1982	ARGUED.